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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 997

LENINE STROLLO, *Petitioner,*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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No.

LENINE STROLLO, *Petitioner,*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit affirming a judgment of conviction entered by the United States District Court for the Northern District of Ohio, Eastern Division.

Opinions Below

The Court of Appeals rendered no opinion. Its judgment is set forth in the Appendix at pp. 28-29. The District Court's unreported opinion denying a severance is set forth in the Appendix at pp. 21-24.

Jurisdiction

The judgment of the Court of Appeals was entered on November 2, 1964. A petition for rehearing was denied on January 21, 1965. By order of Mr. Justice Stewart, the time for the petitioner to file his petition was extended to March 22, 1965. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether it is proper to join with conspiracy charges an unconnected count involving petitioner and a defendant who was disassociated from the conspiracy. Whether the joinder of conspiracy defendants with petitioner, a conspiracy defendant, and Zappia, a defendant not involved in the conspiracy is authorized by Rule 8(b) of the Federal Rules of Criminal Procedure where the conspiracy involved passing of counterfeit notes as genuine and the count against petitioner and Zappia related to an unconnected attempted sale of counterfeit notes and not an attempt to pass them as genuine. Is such joinder prejudicial and contrary to *McElroy* v. *United States*, 164 U.S. 76 (1896); *Schaffer* v. *United States*, 362 U.S. 511 (1959); *Ingram* v. *United States*, 272 F. 2d 567 (4th Cir., 1959); and *Ward* v. *United States*, 289 F. 2d 877 (D.C. Cir., 1961)?

2. Whether a conviction for an attempted sale of counterfeit notes should be sustained where the trial court charged the jury that: "Whenever the design of a person to commit a crime is clearly shown, slight acts done in furtherance of that design would constitute an attempt."

3. Whether the Government's evidence established a criminal attempt in Ohio where it showed preparations made in Ohio to have further discussions in New York on February 4, 1963 to consummate the purchase of counterfeit notes and where no price or quantity of notes to be sold had been determined.

4. Whether there is a violation of 18 U.S.C. 472 and intent to defraud thereunder when an attempted sale is made of false obligations with full disclosure that they are counterfeit.

5. Whether a conviction for an attempted sale of counterfeit notes all bearing serial number C 68185774A may be sustained where the evidence merely disclosed that a single note so numbered had been transferred as a sample and negotiations had not been concluded as to price, quantity or the serial numbers of the notes to be sold. Was petitioner convicted of an attempted sale of counterfeit notes without any evidence of guilt under prejudicially erroneous instructions and in violation of due process?

6. Whether illegal multiple punishment has been imposed by three separate consecutive sentences upon an indictment charging a conspiracy to pass counterfeit notes and the possession and passing of such counterfeit notes as alleged in the conspiracy?

7. Whether a defendant may be convicted and sentenced for conspiracy to pass counterfeit notes and also for the aiding and abetting the passing of such counterfeit notes.

Statutes and Rules Involved

Section 371 of 18 U.S.C. provides:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000.00 or imprisoned not more than five years, or both.
>
> "If, however, the offense, the commision of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed

the maximum punishment provided for such misdemeanor."

Section 472 of 18 U.S.C. provides:

"Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both."

Rule 8(b) of the Federal Rules of Criminal Procedure provides:

"Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all the defendants need not be charged in each count."

Statement

Petitioner was indicted with three co-defendants, Vincent Serman, Robert Armstrong and John Paul Paladinich for conspiracy to defraud, and with passing counterfeit Federal Reserve notes as genuine, contrary to 18 U.S.C. 371, 472, and 473 (Count I, App. p. 17). Overt acts alleged the possession of counterfeit notes on January 2, 1963, and the passing of a counterfeit note on January 4, 1963, by defendant, Paladinich. Counts II and III alleged these overt acts as substantive crimes but specified the

possession and passing of a counterfeit note bearing number E 15258600 C. Armstrong pleaded guilty to Count I (Tr. 1068). Paladinich pleaded guilty to the first three counts (Tr. 1068).

At the trial, defendant, John Paladinich, testified in support of the conspiracy charge and the charges in Counts II and III. He was the Government's principal witness and asserted that plans for the conspiracy were formulated at petitioner's home on January 3, 1963, at 11:00 p.m., where he was shown $60,000 in counterfeit notes (Tr. 9-13). The testimony of a brother, Joseph Paladinich, only implicated defendant Serman in the conspiracy (Tr. 151-213). Defendant Armstrong, although pleading guilty to Count I, denied that petitioner or Serman were in anyway involved in any illegal activity. He asserted that he had possessed $60,000 in counterfeit notes and that he had passed some of them, together with defendant, John Paladinich, and that he later burned $40,000 of the notes. He specifically disclaimed receiving any of the counterfeit notes from petitioner or Serman (Tr. 711, 759, 829, 850). Petitioner and Serman testified in their own defense, denying all charges (Tr. 459-586, 879-993). Serman, a member in good standing of the Ohio Bar, contended he was the object of John Paladinich's revenge, that he had acted as attorney for Paladinich's brother upon his arrest on January 5, 1963, and that he had never engaged in any conspiracy to pass counterfeit notes (Tr. 890-922). Several witnesses corroborated petitioner's claim that he was at home on the evening of January 3, 1963, at a small social gathering and that John Paladinich was not present (Tr. 484-6, 692, 696). Petitioner and Serman were found guilty as charged in the first three counts of the indictment and petitioner was sentenced consecutively to three years on each of these three counts (App. 26).

Petitioner was also charged with another co-defendant, Nick Zappia, with the sale and attempted sale of Federal Reserve notes bearing Serial number C 68185774 A to Secret Service Agent Vecchione on January 31, 1963 (Count V) and passing a counterfeit note as genuine bearing such identical serial number (Count VI).

Co-defendant Nick Zappia was only indicted in Counts V and VI. Petitioner moved for a separate trial of the issues raised by Counts V and VI (App. p. 21). The District Court denied the motion upon the authority of *United States* v. *Welsh*, 15 F.R.D. 189 (D.C. Dist of Col., 1953), observing that the acts charged were within the period of the conspiracy alleged in Count I and that if the evidence failed to substantiate the relationship of these counts with others, the petitioner would be entitled to appropriate relief at the time of trial (App. p. 24). At the close of the Government's case, at the close of all the vidence, and in a motion for a new trial, the motion to sever was unsuccessfully renewed (Tr. 442, 1060, R. 25a). Count VI was dismissed at the close of the Government's case and a verdict of acquittal granted upon the ground that the evidence failed to show an intent to pass Government Exhibit 27, a counterfeit note numbered C 68185774 A as genuine (Tr. 458).

Defendant Zappia testified in his own behalf and denied any intent to sell counterfeit notes (Tr. 641). However, Zappia was a convicted felon on parole (Tr. 620, 672) and the District Court charged the jury that his felony could be utilized to discredit him (Tr. 1103). Count V charged a sale and an attempted sale of counterfeit notes numbered C 68185774 A to Secret Service Agent Vecchione on January 31, 1963, in Youngstown, Ohio.

Agent Vecchione testified that on January 31, 1963, he met Zappia and petitioner, through an informer, that the petitioner displayed a $10.00 counterfeit note to him at

Lenny's Lounge in Ohio. that subsequently on that night a single counterfeit note number C 68185774 A (Govt. Ex. 27) was given to him as a sample by Zappia who was to call the agent in New York City on February 3, 1963, to discuss the deal that could be made for the sale of other counterfeit notes (Tr. 326). The price of the sale had not been arranged nor the quantity of notes to be delivered. Moreover, the sale was not to take place in Ohio. Agent Vecchione stated (Tr. 397):

> "* * * Mr. Strollo and Zappia were to bring the counterfeit money part way to New York. I was to make the arrangements in New York with my man, meet and consummate the transaction."

The District Judge at first advised the jury that petitioner might be found guilty of a sale or attempted sale of Federal Reserve notes numbered C 68185774 A (Tr. 1090), but later charged the jury that there was no sale and confined Count V to an attempted sale of a single Federal Reserve note numbered C 68185774 A. (Govt. Ex. 27, Tr. 1113). After informing the jury that an attempt required an act which reached "far enough toward the accomplishment of the desired result to amount to the commencement of the consummation" (Tr. 1092), the District Court concluded:

> "Whether the design of a person to commit a crime is clearly shown, slight acts done in the futherance of that design would constitute an attempt." (Tr. 1092-3)

Petitioner was found guilty of an attempt as charged in Count V and sentenced thereon to five years probation to follow his sentences on the first three counts of the indictment (App. 26).

The case was submitted to the jury on July 22, 1963, at about noon (Tr. 1115) and further instructions were re-

quested by the foreman as to the necessity of finding both a sale and an attempted sale as charged in Count V (Tr. 1116). The jury's deliberations were subsequently adjourned until the following day when requests were made for information as to the day and time Joseph Paladinich gave his written testimony to Federal officers and testimony as to when Joseph and John Paladinich met defendant Serman at a railroad station on January 4, 1963 (Tr. 1131). The District Court advised the jury that Joseph Paladinich made his written confession on January 5th, 1963, although the Court's Exhibit C clearly shows that it was made thereafter on January 21, or February 21, 1963 (Tr. 1124).[1] The jury deliberated until 4:30 p.m. on July 23, 1963, before reaching the verdict (Tr. 1132-33). After the verdict petitioner renewed his request for acquittal on all counts in a motion to set aside the verdict (R. 25a). Petitioner was sentenced to three years consecutively on each of the first three counts and to five years' probation on Count V. His appeal to the Circuit Court of Appeals resulted in a judgment of affirmance.

Reasons for Granting Writ of Certiorari

The conviction of petitioner is the product of prejudicial misjoinder of defendants contrary to principles approved by this Court and in conflict with decisions of several circuits. The affirmance of petitioner's conviction below raises issues of recurring importance in the administration of criminal justice relating to misjoinder of defendants, the standards to be applied in defining criminal attempts, the construction of the federal counterfeiting statute, and in the area of multiple punishment for the same offense.

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[1] Whether this instruction to the jury constitutes prejudicial error will be more fully developed in the petition for certiorari to be filed by co-defendant Vincent Serman. Petitioner relies upon the discussion of this issue set forth therein.

1. The joinder of Count V herein and the joinder of defendant Nick Zappia who took no part in the conspiracy to pass counterfeit notes was contrary to decisions of this Court and other circuits. *McElroy* v. *United States*, 164 U.S. 76, 81 (1896), forbids "the joinder of distinct felonies not provable by the same evidence and in no sense resulting from the same series of acts." See also *Schaffer* v. *United States*, 362 U.S. 511 (1959). *Ward* v. *United States*, 289 F. 2d 877, 878 (D.C. Cir., 1961), involved narcotic charges which did not grow out of a common conspiracy. Defendant Ward was tried on separate narcotic counts, some charging him alone and some charging him in association with another defendant.

The Court declared:

> "Where multiple defendants are charged with offenses in no way connected, and are tried together, they are prejudiced by that very fact and the trial judge has no discretion to deny relief."

Ingram v. *United States*, 272 F. 2d 567, 570 (4th Cir., 1959), presented joinder of Ingram with different defendants in each of two separate transactions for possession and concealment of liquor upon which a tax had not been paid. The joinder was considered prejudicial with the observation that:

> "The rule against jointly indicting and trying different defendants for unconnected offenses is a long established procedural safeguard."

The dangers of unfairness in criminal conspiracy charges which permit utilization of hearsay evidence have been the subject of widespread criticism from the judiciary and law review commentators. *Developments in the Law-Criminal Conspiracy*, 72 Harvard Law Review 920 (1959). "Prosecutions for conspiracy present difficulties and temp-

tations familiar to anyone with experience as a federal prosecutor", Mr. Justice Frankfurter, *Delli Paoli* v. *United States*, 352 U.S. 232, 246 (1956). This had led some courts to require election between a conspiracy charge and related substantive counts, *United States* v. *Solomon*, 26 F.R.D. 397 (1960). Here, we are concerned with the joinder of a conspiracy count with an unconnected substantive charge and a defendant not involved in the conspiracy.

The conspiracy herein pertained to the passing of counterfeit notes as genuine. Count V charged the attempted sale of bogus notes as counterfeit obligations—an offense not involved in the conspiracy. The evidence supporting Count V was not provable by the same evidence. Defendant Nick Zappia was neither charged nor proven to be a co-conspirator. He and petitioner were convicted under Count V of a January 31, 1963, attempt to sell counterfeit notes to Secret Service Agent Vecchione in Youngstown, Ohio (App. 20, 26). The indictment does not allege that this was connected in any way with the conspiracy to pass counterfeit notes charged against petitioner and the others named in Count I. The trial produced not a shred of evidence to connect these two counts. Count V was not connected with any other counts in the indictment. The District Court acknowledged, in denying a pretrial motion for severance that (App. 24):

> "If at the trial the evidence fails to substantiate the relationship, which the Court believes the indictment indicates, between the acts charged in Counts V and VI and the remaining counts, then the defendants will be entitled to appropriate relief at that time."

The Government argued below that the acts set forth occurred during the period of the conspiracy and that the denial of severance herein was a discretionary matter.

However, there was no proof connecting Count V with the conspiracy. Defendant Zappia was not charged as a co-conspirator although he was the prime negotiator in the events described in Count V. The view that severance here is a matter of discretion conflicts with decisions of this Court and other circuits. Under the cases cited above the prejudicial effect of joinder in violation of Rule 8b is conclusively presumed. Here it is highlighted by the fact that Count V was a matter of first concern to the jury, as revealed by its initial request for additional instructions (Tr. 1116). Count V was supported by direct evidence of a Secret Service Agent. Other counts relied upon accomplice testimony—always viewed with suspicion. The remaining counts also produced a sharp conflict in the testimony. Finally, as we urge later, the evidence supporting Count V did not warrant submission of such count to the jury.

Count V, accordingly, may have presented the difference between acquittal and guilt on all charges herein. The erroneous joinder herein, in conflict with decisions of this Court and other circuits, warrants Supreme Court review.

2. The scope of attempts in our criminal jurisprudence presents "one of the most difficult problems of the criminal law." Prof. Edwin R. Keedy, *Criminal Attempts at Common Law*, 102 University of Pennsylvania Law Review 464 (1954). Criminal attempts have not been authoritatively defined by this Court. In view of the importance and recurring difficulty of the problem presented, this subject merits review by certiorari.

At common law, an act amounted to a criminal attempt when it was so near completion that the danger of sucess was very great. Halsbury in his *Laws of England* (Vol. 10, 3rd Ed., p. 308), states:

> "An act, in order to be a criminal attempt, must be immediately, and not remotely connected with and directly tending to the commission of an offense."

Mr. Justice Holmes in *Commonwealth* v. *Peaslee*, 177 Mass. 267, 272 (1901), refers to acts constituting an attempt as coming very near to the accomplishment of the crime. See also: *Swift & Co.* v. *United States*, 196 U.S. 375, 396 (1904); *People* v. *Rizzo*, 246 N.Y. 334 (1927); *United States* v. *Coplon*, 185 F. 2d 629, 633 (2nd Cir., 1950); and *Beale, Criminal Attempts*, 16 Harvard Law Review, 491, 501 (1903).

Viewed in the light most favorable to the Government, the evidence supporting Count V utterly failed to show any intent to defraud Agent Vecchione or any intent to pass bogus notes as genuine as required by 18 U.S.C. 472. Vecchione sought to purchase counterfeit notes and no attempt was made to sell such notes to him as genuine obligations. Count VI based upon such an alleged fraudulent transfer resulted in a directed verdict of acquittal (Tr. 458). Admittedly, there was no evidence of intent to pass or sell counterfeit notes as genuine. The requisite intent to defraud was likewise lacking for Count V. *Riggs* v. *United States*, 280 F. 2d 750, 752 (5th Cir., 1960).

Moreover, the evidence utterly failed to show a criminal attempt. The conduct of Zappia and petitioner in Ohio on January 31, 1963, was far from the accomplishment of the crime of selling counterfeit notes four days later in New York. Petitioner has been convicted in violation of due process without evidence of guilt. *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960); *Garner* v. *Louisiana*, 368 U.S. 157 (1961).

Under Count V, petitioner and Nick Zappia were convicted of an attempt to sell on January 31, 1963, in Ohio, counterfeit notes numbered C 68185774 A to Secret Service

Agent Vecchione. On January 31, 1963, in Ohio, defendant Zappia gave Agent Vecchione a single counterfeit note numbered C 68185774 A (Govt. Ex. 27) as a sample. Zappia was to call the Agent in New York City on February 4, 1963, to discuss the deal that could be made for the sale of other counterfeit notes (Tr. 326). The price of the sale had not been aranged nor the quantity of notes to be delivered.

The sale was not to take place in Ohio. Agent Vecchione stated (Tr. 397):

> "* * * Mr. Strollo and Zappia were to bring the counterfeit money part way to New York. I was to make the arrangements in New York with my man, meet and consummate the transaction."

The District Judge at first advised the jury that petitioner might be found guilty of a sale or attempted sale of Federal Reserve notes numbered C 68185774 A (Tr. 1090), but later charged the jury that there was no sale and confined Count V to an attempted sale of a single Federal Reserve note numbered C 68185774 A (Govt. Ex. 27, Tr. 1113). After informing the jury that an attempt required an act which reached "far enough toward the accomplishment of the desired result to amount to the commencement of the consummation" (Tr. 1092), the District Court concluded:

> "Whenever the design of a person to commit a crime is clearly shown, slight acts done in the furtherance of that design would constitute an attempt." (Tr. 1092)

Thereafter, the jury revealed its confusion resulting from this charge by requesting instructions whether it was necessary to find both a sale and attempted sale (Tr. 1116). Obviously, under the Court's charge, the jury convicted

petitioner of the attempted sale of a single counterfeit note (Ex. 27) which had not been sold but only transferred as a sample to Agent Vecchione.[2] Obviously, the jury was confused and misled as to the legal standards applicable to criminal attempts. Obviously, the jury convicted petitioner under a count charging intent to sell counterfeit notes numbered C 68185774 A when there was no evidence to show that petitioner possessed for sale a quantity of such notes so numbered. Obviously, the petitioner was convicted although he was very far from accomplishing the alleged sale. Moreover, consideration of this count was prejudiced by joinder with the conspiracy charge herein. Due process and this Court should not allow a conviction, the product of such confusion and erroneous legal standards, to stand.

3. Under the Fifth Amendment no one may be subjected to more than one punishment for the same offense. *Green* v. *United States*, 355 U.S. 184, 201-2 (1957). Petitioner has been sentenced for conspiracy to pass counterfeit notes (Count I), possession of a counterfeit note (Count II), and the passing of a counterfeit note (Count III).

(A) Counts II and III spring from a common scheme—the conspiracy. As they involved a course of conduct, separate punishments should not have been imposed therefor. *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952); *Bell* v. *United States*, 349 U.S. 81 (1954).

(B) Count III involved the passing of a counterfeit note by defendant Paladinich on January 4, 1963. Petitioner

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[2] It was plain error under Rule 52(b) of the Rules of Criminal Procedure to fail to instruct the jury as to every essential element of the crime charged in Count V. *United Brothers of Carpenters & Joiners* v. *United States*, 330 U.S. 395, 412 (1946). The crime charged in the indictment was not the same as the crime outlined for the jury in the instructions. The "jury should not be permitted to speculate on what crime is being submitted to them to resolve or what the contents of each crime might be." *Williamson* v. *United States*, 332 F. 2d 123, 133-4 (5th Cir., 1964). Here, the jury was not only left to speculate but was completely misled as to the nature of the crime submitted to it.

could only be a participant in this passing as an aider and abettor. The same evidence which established petitioner's guilt on Count I was required to convict him on Count III. Ever since *Carter* v. *McClaughry*, 183 U.S. 365, 394 (1901), the test of identity of offenses has been whether the same evidence is required to sustain them. See also *Morgan* v. *Devine*, 237 U.S. 632, 641 (1914), and *Gore* v. *United States*, 357 U.S. 386, 389 (1958).

Count I charges conspiracy to pass counterfeit $10.00 notes with defendant Paladinich actually passing a $10.00 note in Warren, Ohio. Count III charges the passing of a $10.00 note at the Warren Shopping Plaza in Ohio on January 3, 1963. The evidence discloses that this was accomplished by defendant Paladinich in Warren, Ohio (Tr. 23-24). The evidence supporting petitioner's participation as an aider and abettor on Count III is the identical evidence produced to support Count I—the conspiratorial agreement. This multiplication of offenses should not authorize multiple punishments.

(C) Initial criminal conduct is often not treated as a separate offense but is said to merge in the completed crime. *Prince* v. *United States*, 352 U.S. 322 (1957); *Heflin* v. *United States*, 358 U.S. 415 (1958). Conspiracies, presenting perplexing legal problems of fairness, however, are not considered merged in the completed crime. *Pereira* v. *United States*, 347 U.S. 1 (1953). The justice of this position deserves reexamination.

The Proposed Official Draft of the Model Penal Code of the American Law Institute adopted on May 4, 1962 recommends against conviction for more than one offense where "one offense consists only of a conspiracy or other form of preparation to commit the other" (Section 107b, p. 11).

Here, petitioner's conduct as alleged in Counts I through III was designed to culminate in the commission of the same crime—the passing of counterfeit notes. The fairness

of the multiple punishments imposed herein on these three counts should be reviewed.

Conclusion

For the reasons set forth, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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INDICTMENT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

CRIMINAL NO. 63-50

UNITED STATES OF AMERICA,

vs.

LENINE STROLLO, VINCENT SERMAN, ROBERT H. ARMSTRONG, JOHN PAUL PALADINICH, AND NICK ZAPPIA

Violation: Title 18, Section 371, 472 and 473, U.S.C.

* * * * * * *

The Grand Jury Charges:

From on or about November 1, 1962, to on or about February 11, 1963, in the Eastern Division of the Northern District of Ohio, Lenine Strollo, Vincent Serman, Robert H. Armstrong, and John Paul Paladinich knowingly, wilfully, unlawfully, with intent to defraud, did conspire together to defraud the United States of America and to violate Sections 472 and 473, Title 18, United States Code, by receiving, passing, selling, attempting to pass and attempting to sell obligations and securities of the United States made in the similitude of genuine $10.00 Federal Reserve notes with the intent to defraud and with the intent that said counterfeit notes be passed and used as true and genuine when, in fact, said persons knew said notes to be counterfeit.

As part of said conspiracy it was planned and intended that Lenine Strollo and Vincent Serman would receive counterfeit $10.00 Federal Reserve notes and would attempt to sell, transfer, deliver, exchange, pass and find others to buy, pass and attempt to pass said counterfeit $10.00 Federal Reserve notes.

As a further part of said conspiracy it was planned and intended that Robert H. Armstrong and John Paul Paladinich would receive, possess, pass and attempt to pass said counterfeit $10.00 Federal Reserves notes.

As a further part of said conspiracy it was planned and intended that Robert H. Armstrong and John Paul Paladinich would return the proceeds from receiving, possessing, passing and attempting to pass said counterfeit $10.00 Federal Reserve notes to Lenine Strollo and Vincent Serman, including money and property obtained from said activities and that thereafter Lenine Strollo, Vincent Serman, Robert J. Armstrong and John Paul Paladinich would divide said proceeds.

In furtherance of said conspiracy the following overt acts were committed:

1. On or about January 2, 1963, Vincent Serman, John Paul Paladinich and Lenine Strollo met at Lenine Strollo's home at 391 Jackson Street, Campbell, Ohio, and counted six thousand counterfeit $10.00 Federal Reserve notes.

2. On January 4, 1963, John Paul Paladinich passed counterfeit $10.00 Federal Reserve notes at Boardman, Ohio, Youngstown, Ohio, and Warren, Ohio.

3. On or about January 4, 1963, John Paul Paladinich, Vincent Serman and Joseph Paladinich, not herein indicted, met at the New York Central Railroad Depot at Youngstown, Ohio, and divided the proceeds of the passing activities of John Paul Paladinich and Joseph Paladinich in Boardman, Ohio, and Youngstown, Ohio.

4. On or about January 4, 1963, John Paladinich, Lenine Strollo and Vincent Serman met at Liberty Township, Trumbull County, Ohio, and divided the proceeds from the passing activities of John Paul Paladinich at Warren, Ohio.

5. On or about January 31, 1963, Vincent Serman, John Paul Paladinich and Robert J. Armstrong met at Lenny's Lounge at Poland, Ohio, where plans were made for passing and attempting to pass counterfeit $10.00 Federal Reserve notes in Columbus, Ohio, and where Robert J. Armstrong received from Vincent Serman five hundred counterfeit $10.00 Federal Reserve notes for said passing activities.

6. On or about February 1, 1963, John Paul Paladinich and Robert J. Armstrong passed counterfeit $10.00 Federal Reserves notes at Columbus, Ohio.

All in violation of Title 18, Section 371, United States Code.

COUNT II

And the Grand Jury further charges:

On or about January 2, 1963, in the Eastern Division of the Northern District of Ohio, Lenine Strollo, Vincent Serman and John Paul Paladinich did, with intent to defraud, have in their possession a counterfeit obligation of the United States of America purporting to be a $10.00 Federal Reserve note bearing Serial No. E 15285600 C, knowing said note to be counterfeit; in violation of Title 18, Section 472, United States Code.

COUNT III

And the Grand Jury further charges:

On or about January 4, 1963, in the Eastern Division of the Northern District of Ohio, Vincent Serman, Lenine Strollo and John Paul Paladinich did, with intent to defraud, pass and attempt to pass a counterfeit $10.00 Federal Reserve note bearing Serial No. E 15285600 C at the Stambaugh-Thompson Store, Warren Shopping Plaza, Elm Road, Trumbull County, Ohio, knowing said note to be counterfeit; in violation of Title 18, Section 472, United States Code.

COUNT IV

And the Grand Jury further charges:

On or about January 31, 1963, in the Eastern Division of the Northern District of Ohio, at and about Poland, Ohio, Lenine Strollo, John Paul Paladinich and Robert H. Armstrong did, with intent to defraud, have in their possession five hundred counterfeit obligations of the United States purporting to be $10.00 Federal Reserve notes, Serial No. C 67105007 E, knowing said notes to be counterfeit; in violation of Title 18, Section 472, United States Code.

COUNT V

And the Grand Jury further charges:

On or about January 31, 1963, in the Eastern Division of the Northern District of Ohio, at Youngstown, Ohio, Lenine Strollo and Nick Zappia did, with intent to defraud, sell and attempt to sell counterfeit $10.00 Federal Reserve notes bearing Serial No. C 68185774 A to Special Agent Leonard A. Vecchione, of the United States Secret Service, knowing said notes to be counterfeit; in violation of Title 18, Section 472, United States Code.

COUNT VI

And the Grand Jury further charges:

On or about February 1, 1963, in the Eastern Division of the Northern District of Ohio, at Youngstown, Ohio, Lenine Strollo and Nick Zappia did deliver to Special Agent Leonard A. Vecchione, of the United States Secret Service, a counterfeit $10.00 Federal Reserve note bearing Serial No. C 68185774 A, with intent that the same be passed and used as true and genuine, knowing said note to be counterfeit; in violation of Title 18, Section 473, United States Code.

A true bill.

——, ——,
Foreman.

——, ——,
United States Attorney.

MEMORANDUM OPINION ON MOTION FOR SEVERANCE AND FOR SEPARATE TRIALS

Criminal No. 63-50

* * * * * * *

KALBFLEISCH, J.

The indictment contains six counts. The first count charges that Lenine Strollo, Vincent Serman, Robert H. Armstrong, and John Paladinich conspired to receive, pass and sell counterfeit Federal Reserve notes. Count I further alleges that as part of this conspiracy it was planned that Lenine Strollo and Vincent Serman would find others to buy, pass and attempt to pass such counterfeit notes. Counts II, III and IV allege that various of the defendants named in the first count possessed and attempted to pass counterfeit notes. Counts V and VI charge that Lenine Strollo, who was named as a defendant in the conspiracy count, and Nick Zappia, who was not otherwise named in the indictment, attempted to pass and sell counterfeit notes. There is no allegation in Counts V and VI that these actions were taken in pursuance of the conspiracy charged in Count I.

Defendants Lenine Strollo and Vincent Serman have each moved for an order severing Counts V and VI from the remaining counts of the indictment and directing that Nick Zappia and Lenine Strollo, insofar as the latter is charged in Counts V and VI, be tried separately and apart from the trial of the other defendants. The basis for these motions is an alleged misjoinder of parties defendant and of offenses.

1. *Misjoinder of Offenses.*

The moving defendants have urged that there is a material difference between the charge of passing counterfeit notes and the charge of selling such notes. The Court holds that there is such a similarity between passing counterfeit notes and selling them that both activities, in appropriate cases such as this, can be classified as being of

the same or similar character, or as "being based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan". Rule 8(a), Federal Rules of Criminal Procedure; *Cataneo* v. *United States*, 167 F. 2d 820 (4th Cir., 1948).

It is clear that the indictment is concerned with no other matters than a conspiracy to dispose of counterfeit notes and various overt acts which were taken to dispose of such notes. Thus, all of the acts charged in the indictment "are of the same or similar character" (Rule 8(a), Federal Rules of Criminal Procedure) and the offenses were properly joined in one indictment.

2. *Misjoinder of Defendants.*

The moving defendants further contend that there was a misjoinder of defendants in the indictment. Rule 8(b), Federal Rules of Criminal Procedure, provides that:

> "Two or more defendants may be charged in the same indictment if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

The moving defendants' claim of misjoinder is based on the contention that the indictment does not charge that Lenine Strollo and Nick Zappia, insofar as they are named in Counts V and VI, participated in the same transaction or series of transactions that are the subject of the remaining counts of the indictment. Furthermore, Nick Zappia is not named as a defendant in the conspiracy count, and therefore they contend that especially in regard to him there is no indication that the acts charged in Counts V and VI were connected with the acts charged in the other counts. In other words, they urge that there is nothing in the indictment to show that there is any connection between the first four counts and these last two counts. Therefore,

the moving defendants contend that the joinder of Strollo and Zappia under Counts V and VI with the other defendants under Counts I through IV is a violation of Rule 8(b), Federal Rules of Criminal Procedure, and that they are, as a matter of right, entitled to the relief sought. See *Ingram* v. *United States*, 272 F. 2d 567 (4th Cir., 1959); *Ward* v. *United States*, 289 F. 2d 877 (1961, D.C. Cir.); and *United States* v. *Harvick and Beattie*, 153 F. Supp. 696 (N.D. 1957).

The Court does not agree with these contentions because of three allegations which are contained in the indictment: (1) Count I charges Lenine Strollo with being a party to the conspiracy; (2) Count I charges that as part of the conspiracy it was planned that Lenine Strollo would attempt to find others to pass and attempt to pass counterfeit notes; and (3) the acts charged in Counts V and VI are alleged to have occurred on dates which are within the period of the conspiracy alleged in Count I.

A similar question was considered by the District Court for the District of Columbia in *United States* v. *Welsh*, 15 F.R.D. 189 (1953). In that case Judge Holtzoff held that when Count I of an indictment alleged a conspiracy in regard to operation of a numbers racket, and the remaining counts alleged various substantive acts in regard to the numbers racket, the fact that the date of each substantive act was alleged to have been within the time period of the conspiracy created a reasonable inference that the charges in the later counts were part of the same acts or transactions as was the conspiracy count. For this reason the Court there held that joinder of the defendants under Rule 8(b) was proper, and a motion for severance was denied.

This Court believes that the allegations that Strollo was a party to the conspiracy charged in Count I, that the conspiracy contemplated that Strollo would procure others to assist in passing the notes, and in Counts V and VI that Strollo and Zappia were passing and selling counterfeit notes, clearly assert actions which are part of the same series of acts or transactions. This is true in view of the fact that the passes and sales are charged to have occurred within the time period when the conspiracy was in exist-

ence. These allegations are therefore sufficient to charge the existence of one series of acts or transactions making joinder of the defendants permissible under Rule 8 (b), Federal Rules of Criminal Procedure. For other cases where joinder has been held proper, see *Kleven* v. *United States*, 240 F. 2d 270 (8th Cir., 1957); *Kivette* v. *United States*, 230 F. 2d 749 (5th Cir., 1956); and *Wiley* v. *United States*, 277 F. 2d 820 (4th Cir., 1960).

If at the trial the evidence fails to substantiate the relationship, which the Court believes the indictment indicates, between the acts charged in Counts V and VI and the remaining counts, then the defendants will be entitled to appropriate relief at that time.

3. *Relief under Rule 14.*

The Court will consider these motions as requests that it exercise its discretion, pursuant to Rule 14, Federal Rules of Criminal Procedure, to sever the indictment and order separate trials of defendants Strollo and Zappia on Counts V and VI in the basis that the joinder of offenses and defendants in one trial would prejudice any defendant. However, the Court has not been presented with sufficient evidence to warrant such relief. This is especially true in view of the fact that all of the acts alleged appear to have been part of one counterfeiting plan which can best be presented as one entire picture to one jury. The Court, in the exercise of its discretion, will at this time deny such requests.

/s/ GIRARD E. KALBFLEISCH,
United States District Judge.

ORDER

No. Cr. 63-50

* * * * * * *

KALBFLEISCH, J.:

Upon consideration,

IT IS ORDERED that the motions of Defendants Lenine Strollo and Vincent Serman for severance and for separate trials are hereby denied.

/s/ GIRARD E. KALBFLEISCH,
United States District Judge.

JUDGMENT

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

* * * * * * *

CR 63-50

(Filed August 1, 1963)

On this 31st day of July, 1963 came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon a verdict of guilty as to Counts I, II, III, and V of the Indictment of the offenses of having knowingly, wilfully, unlawfully with intent to defraud, conspired to defraud the United States of America, said conspiracy having been with other persons; having, with intent to defraud, had in his possession a counterfeit obligation of the United States of America; having, with intent to defraud, passed and attempted to pass a counterfeit Federal Reserve note, knowing said note to be counterfeit; having, with intent to defraud, sold and attempted to sell counterfeit Federal Reserve notes, knowing said notes to be counterfeit as charged in Counts I, II, III and V of the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years on each of Counts I, II, and III of the Indictment, said sentence to be served consecutively, total sentence: (9) years.

IT IS FURTHER ORDERED that the imposition of sentence on Count V of the Indictment is suspended, and pro-

bation is ordered for five (5) years, said probation to begin upon the completion of the service of the sentence imposed in Counts I, II, and III of the Indictment.

It Is Adjudged that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

It Is Further Ordered that the clerk deliver two certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.

It Is Ordered that the Cleark deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Girard E. Kalbfleisch,
United States District Judge.

JUDGMENT, UNITED STATES COURT OF APPEALS, SIXTH CIRCUIT

(Filed November 2, 1964)

Nos. 15,675; 15676; 15,702

Before EDWARDS, Circuit Judge, PRETTYMAN, Senior Circuit Judge, and BOYD, District Judge.

THIS CAUSE having come on to be heard upon the record, the briefs, and the arguments of counsel, and upon due consideration thereof, finding no error affecting substantial right of appellants,

IT IS ORDERED that the judgment of the District Court be, and it is, hereby affirmed.

Entered by order of the Court.

CARL W. REUSS,
Clerk.

ORDER DENYING PETITIONS TO REHEAR AND MOTIONS TO REMAND

(Filed January 21, 1965)

Nos. 15675 and 15676

UNITED STATES COURT OF APPEALS

Before EDWARDS, Circuit Judge, PRETTYMAN, Senior Circuit Judge (by designation), and BOYD, District Judge (by designation).

Upon due consideration by the Court of Appellants' pending petitions to rehear and motions to remand and stay mandate of this Court and the response thereto by the Appellee herein,

IT IS ORDERED that said petitions to rehear and motions to remand and stay be and the same are hereby in all things denied.

By order of the Court.

/s/ CARL W. REUSS,
Clerk.

(4182-2)

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 17 1965
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 1011

VINCENT SERMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. _____.

VINCENT SERMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit affirming a judgment of conviction entered by the United States District Court for the Northern District of Ohio, Eastern Division.

OPINIONS BELOW.

The Court of Appeals rendered no opinion. Its judgment is set forth in the Appendix at p. 46. The District Court's unreported opinion denying a severance is set forth in the Appendix at pp. 31-35.

JURISDICTION.

The judgment of the Court of Appeals was entered on November 2, 1964. A petition for rehearing was denied on January 21, 1965. By order of Mr. Justice Stewart, the time for the petitioner to file his petition was extended to March 22, 1965. Jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

1. Should a trial court in a charge to the jury, after submission of the case, either of its own motion or upon request of the jury or upon request of either party, give an instruction to the jury which assumes as true the existence or non-existence of any material fact in issue in respect of which the evidence is conflicting or disputable?

2. Whether a trial court's incorrect and misleading answer and instruction on an issue of fact in response to a question by the jury, after submission of the case, constitute prejudicial error?

3. Whether petitioner suffered substantial prejudice from being convicted of a single general conspiracy charged in the indictment by evidence which proved not one but two conspiracies, *the other not charged in the indictment*, though of the same sort, the only *nexus* of which was an alleged co-conspirator's participation in both?

4. Whether it is proper to join with a conspiracy charge an unconnected count involving co-defendants with petitioner who was disassociated from that count and whether such joinder is authorized by Rule 8 of the Federal Rules of Criminal Procedure, where the conspiracy involved passing of counterfeit notes as genuine and the count against the co-defendants, Strollo and Zappia, related to an unconnected attempted sale of counterfeit notes and not an attempt to pass them as genuine? [1]

5. Whether petitioner was substantially prejudiced by added emphasis placed by the trial court upon tainted,

---

[1] This is the same issue raised by petitioner Strollo; his petition for certiorari is at this time before the court. Reference thereto is made and petitioner here relies on that discussion as well as the discussion of other closely related issues raised in that petition. (pp. 2, 3, Petition for Certiorari, *Strollo v. United States.*)

evasive and untruthful testimony offered by a key Government witness, such testimony having become the subject of a jury question after submission of the case and where Government counsel was aware that the witness' answers were not a truthful disclosure. Was such contrary to *Mesarosh v. United States,* 352 U. S. 1, 352 U. S. 808, 352 U. S. 862?

STATUTES AND RULES INVOLVED.

Section 371 of 18 U. S. C. provides:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000.00 or imprisoned not more than five years, or both.
>
> "If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

Section 472 of 18 U. S. C. provides:

> "Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both."

Rule 8(a) of the Federal Rules of Criminal Procedure provides:

> (A) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in

a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Rule 8(b) of the Federal Rules of Criminal Procedure provides:

"Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all the defendants need not be charged in each count."

Rule 14 states:

"RELIEF FROM PREJUDICIAL JOINDER.

"If it appears that a defendant or the Government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

STATEMENT.

Petitioner was indicted with four co-defendants, Lenine Strollo, Robert Armstrong and John Paul Paladinich, for conspiracy to defraud, and with passing counterfeit Federal Reserve notes as genuine, contrary to 18 U. S. C. 371, 472 (Counts I, II and III, App. pp. 27-30); one Zappia was indicted with Strollo in two unconnected substantive counts (Counts V, VI, App. p. 30). Overt acts alleged the possession of counterfeit notes on January 2, 1963, and the passing of a counterfeit note on January 4, 1963, by defendant, John Paladinich. Counts II and III alleged these overt acts as substantive crimes but specified the possession and passing of a counterfeit note bearing number E 15258600 C. Armstrong pleaded guilty to Count I (Tr. 1068). Paladinich pleaded guilty to the first three counts (Tr. 1068). The case was titled "Criminal No. 63-50 in the United States District Court, Northern District of Ohio, Eastern Division" in a six count indictment.

At trial, defendant, John Paladinich, testified in support of the conspiracy charge and the charges in Counts II and III. He was the Government's principal witness and asserted that plans for the conspiracy were formulated at Strollo's home on January 3, 1963, at 11:00 p.m., where he was shown $60,000 in counterfeit notes (Tr. 9-13). He said the plan was "there were supposed to be two teams that was supposed to *pass* these counterfeit notes, myself and my brother * * *" (Tr. 12). The testimony of a brother, Joseph Paladinich, implicated defendant Serman in the substantive counts (Tr. 151-213). Defendant Armstrong, although pleading guilty to Count I, denied that petitioner Serman was in any way involved in any illegal activity. He asserted that he had possessed $60,000 in counterfeit notes and that he had passed some of them, together with defendant, John Paladinich, and that

he later burned $40,000 of the notes. He specifically disclaimed receiving any of the counterfeit notes from petitioner (Tr. 711, 759, 760, 761, 762, 829, 850). He testified in essence that he and John Paladinich formed a partnership and that Paladinich had made the arrangements to obtain the original delivery of counterfeit bills from person or persons known only to Paladinich. Petitioner and Strollo testified in their own defense, denying all charges (Tr. 459-586, 879-993). Petitioner, a member in good standing of the Ohio Bar, contended he was the object of John Paladinich's revenge, that he had acted as attorney for Paladinich's brother upon his arrest on January 5, 1963, and that he had never engaged in any conspiracy to pass counterfeit notes (Tr. 890-922). Petitioner's employment as attorney was admitted by Joseph Paladinich (Tr. 175, 176, 199). A witness, Anthony Carelly, corroborated petitioner's claim that he was at his office during the hours Joseph and John Paladinich testified he was at a meeting with them on January 4, 1963 (Tr. 684, 685, 686). Further, credible testimony showed that petitioner was not at the meeting place testified to by John Paladinich, to-wit, the basement of the home of a co-defendant, Lenine Strollo, at the date and time testified to as 11:00 o'clock p.m., January 3, 1963 (Tr. 485, 604, 608, 610, 697, 701).

Lenine Strollo, one of petitioner's co-defendants, was also charged with another co-defendant, Nick Zappia, with the sale and attempted sale of Federal Reserve Notes bearing Serial number C 68185774 A to Secret Service Agent Vecchione on January 31, 1963 (Count V) and passing a counterfeit note as genuine bearing such identical serial number (Count VI).[1]

---

[1] The development of the prejudicial effect of the misjoinder is set forth in the petition for certiorari to be filed by co-defendant Strollo. Petitioner relies also upon the discussion set forth therein.

Strollo's co-defendant, Nick Zappia, was indicted in Counts V and VI. Petitioner and Strollo moved for a separate trial of the issues raised by Counts V and VI (App. p. 30). The District Court denied the motion upon the authority of *United States v. Welsh*, 15 F. R. D. 189 (D. C. Dist. of Col., 1953), observing that the acts charged were within the period of the conspiracy alleged in Count I and that if the evidence failed to substantiate the relationship of these counts with others, the petitioner would be entitled to appropriate relief at the time of trial (App. pp. 34-35). At the close of the Government's case, at the close of all evidence, and in a motion for a new trial, the motion to sever was unsuccessfully renewed (Tr. 442, 1060, R. 25a). Count VI was dismissed at the close of the Government's case and a verdict of acquittal granted upon the ground that the evidence failed to show an intent to pass Government Exhibit 27, a counterfeit note numbered C 68185774 A as genuine (Tr. 458).

Defendant Zappia testified in his own behalf and denied any intent to sell counterfeit notes (Tr. 641), and he further testified that petitioner was in no way a participant, and that he was "remotely" acquainted with him. However, Zappia was a convicted felon on parole (Tr. 620, 672), and the District Court charged the jury that his felony could be utilized to discredit him (Tr. 1103). Count V charged a sale and an attempted sale of counterfeit notes numbered C 68185774 A to Secret Service Agent Vecchione on January 31, 1963, in Youngstown, Ohio.

Agent Vecchione testified that on January 31, 1963, he met Zappia and Strollo, through an informer; that Strollo displayed a $10.00 counterfeit note to him at Lenny's Lounge in Poland Township, Ohio; that subsequently on that night a single counterfeit note number C 68185774 A (Govt. Ex. 27) was given to him as a sample

by Zappia who was to call the agent in New York City on February 3, 1963, to discuss the deal that could be made for the sale of other counterfeit notes (Tr. 326). The price of the sale had not been arranged nor the quantity of notes to be delivered. Moreover, the sale was not to take place in Ohio. Agent Vecchione stated (Tr. 397):

> "* * * Mr. Strollo and Zappia were to bring the counterfeit money part way to New York. I was to make the arrangements in New York with my man, meet and consummate the transaction."

The District Judge at first advised the jury that Strollo might be found guilty of a sale or attempted sale of Federal Reserve notes numbered C 68185774 A (Tr. 1090), but later charged the jury that there was no sale and confined Count V to an attempted sale of a single Federal Reserve note numbered C 68185774 A (Govt. Ex. 27, Tr. 1113). After informing the jury that an attempt required an act which reached "far enough toward the accomplishment of the desired result to amount to the commencement of the consummation" (Tr. 1092) the District Court concluded:

> "Whether the design of a person to commit a crime is clearly shown, slight acts done in the furtherance of that design would constitute an attempt." (Tr. 1092-3.)

Strollo and Zappia were found guilty of an attempt as charged in Count V and sentenced thereon, to five years probation and five years imprisonment respectively, and the former to follow Strollo's sentences on the first three counts of the indictment.

The case was submitted to the jury on July 22, 1963, at 11:30 o'clock, A. M. (Tr. 1115). Jury deliberations continued until 4:30 o'clock, P.M., on July 23, 1963 (Tr. 1132) with time out for meals and rest. Actual deliberations took place for approximately nine hours. However,

after eight and one-half hours of such deliberations, the jury asked to be heard on a question that concerned only petitioner Serman. The question submitted to the trial court by the jury was a two-fold query (Tr. 1124):

> "The jury would like to hear the court records as to the day and time Joseph Paladinich gave his *written statement* to the federal officers."
>
> "The jury would like to hear the court records of the testimony of Joseph and John Paladinich concerning meeting with *Serman* at the New York Central Railroad Station."

The trial court first stated to counsel that he would not risk giving his own recollection as to the date and time Joseph Paladinich made the *written* statement (Tr. 1130); the Court then actually instructed the jury from his recollection (Tr. 1131). The instruction was not responsive to the jury's question and the response given was not of itself a correct statement of the testimony of Joseph Paladinich (Tr. 181, 182, 183). The jury had asked for the *written* statement; the Trial Court's instruction was grossly incorrect and misleading where the Court stated "* * * the date and time of *Joseph Paladinich's statement* to the *Federal officers* was January 5th, between 2:00 and 3:00 o'clock in the afternoon" (Tr. 1131). The *actual written* statement of Joseph Paladinich (App. pp. 37-46) had been marked at trial as "Court's Exhibit C," and was in the Trial Court's possession and not in the possession of the jury during their deliberations.

The *written statement* itself clearly sets forth that it was made and executed on February 21, 1963, *forty-seven days after* the date given the jury in the Court's instruction. The sworn statement sets forth allegations of events and dates occurring through February 20, 1963, and could not possibly have been executed prior to February 21,

1963, which is the execution date set forth therein. A study of Joseph Paladinich's testimony on the subject shows he was evasive, untruthful and very guarded on the subject of when he gave his statement (Tr. 181, 182, 183). Page one of that statement indicated it was executed and sworn to on February 21, 1963; the last page indicates it was executed on January 21, 1963 (App. p. 39.)

There is little doubt that the jury's concern and question, after eight and one-half hours of deliberations and being unable to find guilt as to petitioner in the light of the general charge, was directed solely to the "*written*" statement of Joseph Paladinich. The jury originally wrote out the question and left out the word "*written*," thereby asking only for the date and time of the "*statement.*" But, before submitting the question to the Trial Court, the jury, by specifically inserting the word "written" in front of "statement," made its request for instruction clear and concise.

Within five or six minutes after the Trial Court instructed the jury on the query made, the jury reached a decision of guilty and petitioner was later sentenced to a total of thirteen years confinement. (App. pp. 35-36.)

None of the testimony by witnesses or documentary proof connected petitioner as a criminal conspirator or aider and abettor except the testimony of John and Joseph Paladinich.[1] Robert Armstrong testified that he was the accomplice of John and Joseph Paladinich (Tr. 714-734) and that he (Armstrong) and not Serman, petitioner herein, met with John and Joseph Paladinich at the New York Central Train Station (Tr. 735-743). John Paladinich, an experienced felon (Tr. 82, 87, 88), undesirably discharged from the United States Army, was the only

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[1] Brothers, Joseph, an unindicted accomplice of John Paladinich (App. p. 38).

witness against petitioner with "alleged knowledge of the facts." Joseph Paladinich corroborated with the very testimony and issue the jury asked about (Tr. 158, 159, 160, 161). Considering the prejudicial joinder of Counts V and VI wherein Strollo and Zappia were charged, the latter being an admitted parolee and one who made his living by theft; the only grounds for joinder would be that the time element was so close and that the nexus among the defendants was a co-conspirator, Strollo; petitioner therefore was joined on a theory forbidden by the Supreme Court of the United States.[1] Not one word of testimony, directly or circumstantially, nor any real evidence offered as proof of guilt on Counts V and VI was relevant to or in any way connected with the charges in Counts I, II, III and IV. The only connection between those counts was and is that Strollo was named in Counts I, II, III and IV and also in Counts V and VI with the defendant Zappia. Zappia was not in any way related in fact or in charge with the first four counts; further, the overt acts as described in Count I ended with the matters complained of in Count IV and in no way related to the Counts V and VI; nor was Zappia named in the overt acts.

The Trial Court had reserved power or discretion for use at a later time (App. p. 35). Factually, the way the case developed at trial, the testimony of John Paladinich showed that if anything, the plan was for "two teams of *passers*" (Tr. 12) and alleged nothing with relation to Counts V and VI. There was no other testimony about this matter offered at any time. Hence, the only possible connection between the alleged conspiracy in Count I with that which petitioner now refers to as an alleged conspiracy in Counts V and VI was Strollo. Strollo was alleged to

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[1] Cf. *Kotteakos v. United States*, 328 U. S. 750 (1946).

be the only participant in all counts and such alleged participation in all counts is the only *nexus* among the counts.[1]

Count IV of the indictment was dismissed at the first instant of trial. During trial, Count VI was also dismissed on motion by defendants and the trial court held that there was no proof on record to allow this count to go to the jury (Tr. 457-458). During instructions to the jury, the Trial Court removed a part of Count V from consideration, this being that part which referred to "sale" (Tr. 1113-1114). At this point, not even the language of Count V bore any resemblance to the "relationship" spoken of by the Trial Court in its memorandum at pre-trial (App. pp. 31-35). The only *nexus* then was the alleged participation of Strollo. A perusal of the record shows that there is not one scintilla of testimony or circumstance showing an "attempt to sell" *as counterfeit* (*not true* and *genuine*) as a part of the proof in Counts I, II and III. This testimony came only from the Agents who testified with reference to Counts V and VI only.

The jury deliberated for about nine hours and at 4:30 o'clock, P.M., on July 23, 1963, five to six minutes after the Trial Court retired them to consider the "after submission" charge, they returned the verdict (Tr. 1132-33). After the verdict, petitioner renewed requests for acquittal on all counts in a motion to set aside verdict (R. 25a). Petitioner appealed to the United States Circuit Court of Appeals (6th C. A.) and the result was judgment of affirmance without opinion and a denial of rehearing without opinion (App. pp. 46-47).

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[1] Strollo's conviction as well as Zappi's is in serious doubt in the light of the discussion in his petition for certiorari, *Strollo v. United States*.

REASON FOR GRANTING WRIT OF CERTIORARI.

Conviction of petitioner came about as the result of a prejudicial instruction given the jury by the Trial Court after submission of the case and in response to a jury question concerning the assumption by the Trial Court as true, the existence of a material fact in issue in respect of which the testimony is conflicting, disputable, tainted and incorrect as to the recitation of such to the jury. The said conviction also rests upon the prejudicial misjoinder of defendants and counts in an indictment, contrary to principles approved by this Honorable Court and in conflict with decisions of several Circuit and District Courts. The affirmance of petitioner's conviction and denial of rehearing in the Circuit Court below raises issues of recurring importance in the administration of criminal justice and procedures relating to instructions to jury, misjoinder of defendants and counts in an indictment, the standards to be applied in defining criminal attempts, the construction of the Federal counterfeiting statutes and in the area of multiple punishments for the same offense.[1]

The instructions given the jury in response to the jury's question (Tr. 1130-31) after submission of the case was contrary to decisions of this Court, Circuit Courts and District Courts. In *Quercia v. United States*, 289 U. S. 466, 469 (1933), where the Solicitor General did not oppose certiorari, the Court held the Trial Judge "may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted

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[1] The matters of standards to be applied in defining criminal attempts, the construction of counterfeit statutes and the area of multiple punishments for the same offense is carefully set forth in the petition for certiorari filed by co-defendant Lenine Strollo (*Strollo v. United States*, Petition for Writ of Certiorari, pp. 9 through 16, inc.). Petitioner relies on the discussion as therein set forth.

to their determination." The Trial Court "should *caution the jury against* relying on uncorroborated testimony of an accomplice," and the Court "* * * cannot assume as a fact, when controverted * * * that one is an accomplice, a conclusion which was controverted and against which the jury might have found in the light of the testimony." [1] See *Holmgren v. United States*, C. C. A. 9th (1910), 217 U. S. 509, 510, 523; see also *Blanton v. United States*, 213 F. R. 320, C. C. A. 8th (1914) at page 326, where the Court held "an instruction as to evidence which would have a tendency to divert the minds of the jury from the controlling effect which other proper evidence may have on their minds should be refused." In *Quercia v. United States* (*supra*), Chief Justice Hughes held that "the trial Judge did not analyze the evidence; he added to it and he based his instruction upon his own addition." * * * "Dealing with a mere mannerism of the accused in giving his testimony, the Judge *put his own experience with all the weight that could be attached to it*, in the scale against the accused." (Emphasis added.) *Quercia v. United States*, 289 U. S. at 471 (1933). Then at page 472, the Chief Justice continued as though he foresaw the coming of *Bollenbach v. United States* twelve years in the future for this Court (discussed *post*) when he said:

> "Nor do we think that the error was cured by the statement of the Trial Judge that his opinion of the evidence was not binding on the jury and that if they did not agree with it, they should find the defendant not guilty. His *definite* and *concrete assertion of fact*, which he had made with all the *persuasiveness of judicial utterance*, as to the basis of his opinion, was not withdrawn." (Emphasis added.)

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[1] Joseph Paladirich was an unindicted accomplice (App. p. 38).

In the case at bar, the jury asked for the date and time the *written* statement of Joseph Paladinich was given to the Federal officers (Tr. 1124). The jury also asked for the testimony of John and Joseph Paladinich concerning meeting with petitioner at the New York Central Railroad Station (*ibid.*). The instruction relative to the date and time of the written statement which the Trial Court gave the jury was grossly incorrect and defendant properly objected. Moreover, the *actual written statement* (App. pp. 37-46) had been marked at trial as "Court's Exhibit C" (Tr. 185) and was in the possession of the Court at the times mentioned and never in the possession of the jury. Government counsel made statements concerning the disputable questions involved (Tr. 1128) but the Court said the written statement was "given on January 5th, between 2:00 and 3:00 o'clock in the afternoon." The Court then stated the alternatives (Tr. 1129) and then the Court stated "I am not going to run the risk of my recollection in the matter" (Tr. 1130). Counsel objected (Tr. 1131) and then the jury was called and the Trial Court addressed the jury by repeating the jury questions as follows:

> "The jury would like to hear the Court records as to the day and time Joseph Paladinich gave his *written statement* to the Federal Officers" (Tr. 1131).
>
> "To answer that question, the Court is going to do so from his own recollection. The Court's recollection is that the date and time of Joseph Paladinich's *statement* to the Federal Officers was January 5th, between 2:00 and 3:00 o'clock in the afternoon" (Tr. 1131).

This response to the jury's question was made with all *the definite and concrete assertion of fact* which the Court made with all the *persuasiveness of judicial utterance*. See

Quercia v. United States, 289 U. S. at 472 (1933) (Emphasis added). This answer was given even in the light of the evasive testimony given by the witness (Tr. 181, 182, 183) and after the witness says it was "later" (Tr. 184) that he was presented with a typewritten statement that purported to be what he old the Federal Officers (Tr. 184) and that he signed it and identified it when it was shown to him as "Court's Exhibit C" (Tr. 185) and then he says it is the statement he signed "shortly after he told the Federal Officers his story." (*ibid.*) The statement itself shows clearly it was not made on January 5th, 1963, since it clearly sets forth alleged events and dates occurring through February 20, 1963, and shows clearly on its face to be sworn to and witnessed on February 21st, 1963. Thus it is forty-seven days later than the instruction given by the Trial Court (Tr. 1131), and the assertion of a fact and an opinion of the facts based on admittedly disputable (Tr. 1128) facts, controverted facts (Tr. 181, 2, 3, 4) and matter based on evasive, untruthful and tainted testimony.[1] A Trial Judge, in delivering additional charge, when it is apparent that doubt exists in the minds of jury, should exercise caution and refrain from indicating opinion. See *Boyett v. United States*, C. C. A. 5th, 48 Fed. 2nd 482, 1931.

There can be no doubt that the jury's concern and difficulty was directed to *when the written statement* of Joseph Paladinich was made. (Emphasis added.) The jury originally wrote out the question and left out the word

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[1] In *Mesorash v. United States*, 352 U. S. 1 (1956) 352 U. S. 808; 352 U. S. 862; the dignity of the United States Government will not permit the conviction of any person on "tainted" testimony; *any* perjury pollutes the waters of the entire trial. See also *Mitchell v. United States*, 368 U. S. 439. See also *Napare v. Illinois*, 360 U. S. 264, although involved with the 14th Amendment, the rule is the same for the case at bar since the witness obviously had a "possible interest" based upon "subtle factors."

"written," thereby asking only for the date and time of the "statement." (See App. R. Ex.) But prior to submitting the question to the Trial Court, the jury specifically inserted the word "written" in front of "statement," and thus made its difficulties clear and evident. At this point, petitioner relies on *Bollenbach v. United States*, 326 U. S. 607 (1946); this is the case petitioner believes Chief Justice Hughes foresaw when he wrote the opinion in *Quercia* twelve years before. The Honorable Justice Frankfurter stated in his opinion at pages 612-13 of Bollenbach:

> "When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy."
>
> "A conviction ought not to rest on an equivocal direction to the jury on a basic issue."[1]

The Government argued in *Bollenbach* as to what reason there is for assuming that the jury did not disregard the judge's direction and that, further, the "sting of error is extracted because there was proof, other than the erroneous instruction." Justice Frankfurter held at page 614:

> "This is to disregard the vital fact that for seven hours, the jury was unable to find guilt in the light of the main charge, but reached a verdict of guilty under the conspiracy count *five minutes* after their inquiry was answered by an untenable legal proposition." "* * * it may not be amiss to remind that the question is *not* whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the Federal Courts."

To attempt to pass the misleading, controverted misdirection off as a matter of "no great significance" or as

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[1] See also *Starr v. United States*, 153 U. S. 614 (1894).

"harmless error" must necessarily be futile. It is vital to note that petitioner could not be found guilty after some eight hours of deliberations by the jury; but the jury reached a guilty verdict only five or six minutes after receiving the instruction complained of (Tr. 1124 and Tr. 1132);[1] the court was summoned and Government Counsel addressed the Court with suggestion that more testimony be read to the jury (Tr. 1132-3) but the jury had already arrived at the verdict of guilty (Tr. 1133-4).

The jury's question per se established that they were still in doubt as to petitioner's guilt and had not been able to arrive at any determination as to him in the light of the main charge during eight hours of deliberations; the two part question pertained only to petitioner Serman, and the matter inquired about[2] involved herein alleged evasive, tainted testimony and testimony controverted by petitioner, co-defendant Armstrong (Tr. 735-743), witness Carelly (Tr. 684-686); the defense had contended that Serman, an attorney thrown into the time table of events per force of his employment, was the escape hatch for John and Joseph Paladinich;[3] that John Paladinich had

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[1] This included the time the jury spent in the question, discussion and colloquy time, searching the record time, instruction time, testimony reading, retirement and then the signal at 4:30 P.M. The Government would no doubt agree that the maximum time of deliberation after the questioned instruction was not more than four to six minutes.

[2] Testimony of Joseph Paladinich (Tr. 181, 2, 3, 4) is so apparently evasive ("I can't recall") on the vital matter of when he made a signed statement, sworn to and witnessed by two Federal Agents (App. pp. 37-46) that it rings falsely when the language employed by Government counsel at Tr. 1128 to explain the Government's position on the matter; surely, Joseph Paladinich would remember the dates he gave sworn statements! Did the Court lend credibility to the testimony of John and Joseph Paladinich about the New York Train Station incident (Tr. 21, 22; 158, 160, 161).

[3] Both were placed on 3 years and 2 years probation even though John Paladinich was an admitted felon, jailbreaker and

(Continued on following page)

first concocted Serman's involvement[1] and Joseph went along with his brother's testimony.

The incorrect instruction by the Trial Court nullified to a great extent petitioner's defense involving the alleged meeting at the New York Central Railroad Station on January 4, 1963, in that it gave credit to Joseph's testimony that he made a *written statement* (the day following the alleged meeting) and before his brother John had been in contact with the Federal Agents. In fact, the "Court's Exhibit B" clearly established that *John* Paladinich made the first statement to the Federal Agents on February 9, 1963 (Tr. 92-96).

In the *Quercia* case, this Court held that an incorrect or misleading instruction on the facts by the Trial Judge to the jury is not cured by the general instruction that the Trial Court's opinions of the evidence are not binding on the jury. See also *Harding v. United States*, 335 Fed. 2nd 515 (1964), but even more important is the fact that in *Quercia* and *Harding*, the misleading instructions were made to the jury in the general charge and were determined to constitute prejudicial error. Clearly, a misleading and incorrect instruction of fact in response to jury inquiry after lengthy deliberation and after submission of the case, magnifies the prejudicial effect of the error many times more; in *Bollenbach*, Justice Frankfurter said at page 612:

> "The influence of the Trial Judge on the jury is necessarily and properly of great weight, (*Starr v. United States*, 153 U. S. 614, 626) and jurors are ever watchful of the words that fall from him. Par-

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(Continued from preceding page)

received an undesirable discharge from the United States Army (Tr. 82, 83, 87, 88, 120 thru 138).

[1] John gave his statement on February 9, 1963; Joseph gave his on February 21, 1963, forty-seven days *after* his arrest and twelve days after his brother's arrest. It can be noted that a statement in writing given the day after one's arrest would ring with truth more so than one given forty-seven days later.

> ticularly in a criminal trial, *the judge's last word* is apt to be the *decisive* word. *If it is a specific ruling on a vital issue and misleading, the error is not cured* by a prior unexceptionable and unilluminating abstract charge." (Emphasis added.)

The time element in the case at bar is closely related of *Bollenbach* and the effect of the error appears clear,

The influence of the Trial Judge on the jury is necessarily and properly of great weight, and the judge's lightest word or intimation is received with deference, and may prove controlling. Petitioner has a right to a fair trial. Such was the situation in *Wrightson v. United States,* where the dissenting Justice felt that "in any event, guilt is clear." However, the majority held:

> "We are not dealing with a mere error of law occurring in the course of trial and which can be disregarded as harmless. The appellant invoked a constitutional right, and we are dealing with the constitutional question. But even as to an erroneous instruction the *Supreme Court has given us strict directions.* In *Bollenbach v. United States,* in response to a contention that the evidence of guilt was abundant and that therefore error in the Court's charge to the jury was not ground for reversal of the conviction, the Court said: 'it may not be amiss to remind that the question is not whether guilt may be spelt out of the record, but whether guilt has been found by a Jury according to the procedure and standards appropriate for criminal trials in the Federal Courts.' " *Wrightson v. United States,* 222 Fed. 2nd at page 561.

In *Wrightson,* the court went on to say that "all law is technical if viewed solely from concern for punishment of crime without heeding the mode by which it is accomplished."

In *McFarland v. United States*, 174 Fed. 2nd 538 (1949) the court followed *Bollenbach* in holding that where two instructions are in conflict and one is prejudicial, the case must be reversed since the jury may have followed the erroneous charge.

In the *Bollenbach* case, Justice Frankfurter cited *Starr v. United States*, 153 U. S. 614 at page 626:

> "a Federal Judge may sum up the facts * * * to the jury, and express an opinion upon them, he should take care however to separate the law from the facts, and leave the latter in unequivocal terms to the judgment of the jury." (Cf. *Starr v. United States*, 153 U. S. at page 626.)

In *United States v. Dunn*, 299 Fed. 2d 554, Sixth Circuit, Circuit Judge O'Sullivan held

> "where plain error[1] has been committed affecting substantial rights of the accused in a criminal case, an appellate court may take notice on its own motion of such error." (Citing *Bollenbach*.)

It has been the position of the Government from the very beginning that the conspiracy alleged in count one of the Indictment encompassed the act complained of in count five. The Trial Court specifically sustained the Government's position in its pre-trial Memorandum overruling appellant's motions under Rules 8(a) (b) and 14; and the Court never varied its position. However, the Government's proof on the conspiracy count did not show that the crime in count five was the result of, or inspired by, the conspiracy which allegedly embraced it, nor did the Government show by its proof of count five that this vio-

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[1] The misjoinder and misdirection after submission is such error that the Circuit Court of Appeals should have noticed on its own motion once it was brought to the attention of the Court. (Rule 52(b).)

lation in any way resulted from the conspiracy. The Government showed no connection whatsoever between the conspiracy and the substantive offense, other than that there was a common member, Strollo. The certain substantial harm that resulted to the appellant resulted from the fact that the evidence to convict the co-defendants on the fifth count, and heard by the jury which had to consider the first count also, came from two Agents of the United States Secret Service. In fact, it was the Government's entire position, sustained by the Court, not only that this evidence applicable to proof in count five might be considered as proof of the conspiracy, but should be considered as part of the conspiracy set forth in count one.

In part, the decision in this case should rest also on the principles announced in *Kotteakos v. United States*, 328 U. S. 750, 66 S. Ct. 1239 (1946). The Government may not string together, for common trial, separate and distinct crimes, conspiracies, related in kind though they may be, when the only *nexus* among them lies in the fact that one man participated in all. It may be argued that although the general rule of the *Kotteakos* case was not applied in favor of this petitioner, the error did not affect his substantial rights, and that the general rule of *Berger v. United States*, 295 U. S. 78 (1935), should apply. This simply is not true, because the substantial rights of the petitioner have been affected, even under the rule of *Berger*. Certainly the evidence in the fifth count could not effectively be separated by the jury in determining guilt on the first count; there was a common participant whose guilt also was in issue; the Government said count five was a part of the conspiracy, and the Court also decided that count five was within the orbit of count one. Here, petitioner was convicted of count one which allegedly embraced count five; but there was no proof connecting the

two. What is the position of the petitioner if the Government decided to indict him, Strolllo and Zappia for a separate conspiracy to violate Section 472, United States Code, using the evidence relevant to count five as evidence to convict on the new conspiracy? What is to prevent the Government from doing this? Could he plead "former conviction"? (The statute of limitations has not run on such possible conspiracy charge.) The entire gist of the *Kotteakos* case is to the effect that such possibility certainly affects petitioner's substantial rights. Actually, the general rule laid down in *Berger* does not apply to this case because even there the Court decided that:

> "the fact the proof disclosed two conspiracies instead of one, each within the words of the indictment, cannot prejudice his defense of former acquittal of the one or former conviction of the other, if he should again be prosecuted." Berger v. United States, 295 U. S. 78, 55 S. Ct. 628 at 631.

Consider also the construction of the indictment in the light of the Trial Court's analysis of it; the overt acts (App. pp. 27-30) go only as far as count four. There is no indication in these counts of a connection as the proof disclosed at trial. The Court should have required the Government to elect or to grant other appropriate relief. The Government failed to prove that co-defendant Strollo furthered a plan to sell, pass, attempt to pass or deliver counterfeit notes as the trial court thought in the Memorandum (App. 31-35), and this would have been the gist of the Court's holding. An indictment must be tested by what it alleges and not by what the draftsman intended to allege. See *United States v. Lembo,* 184 Fed. 2nd 411 (1950). The Trial Court saw a "possible" relationship (App. p. 33) and therefore, prior to trial refused to separate; the Court's theory was "that part of * * * the

plan * * *" was that Strollo and Serman "would find others to buy, pass and attempt to pass * * * notes * * *" and the Court held there was a similarity between passing notes and "selling notes." (App. 31.) However, the Court disregarded at trial the fact that the only words spoken by anyone as to alleged plans were by John Paladinich who said:

> "there was supposed to be two teams that was supposed to *pass* these notes, myself and my brother * * * there was supposed to be two other fellows. I didn't know whom Mr. Strollo was supposed to have *passing* for him."
>
> "My brother and myself were supposed to pass $30,000 * * *." (Tr. 12.)

This was the full stature of the testimony on the alleged "plan" at the very earliest stage of the trial. No other plan was ever alleged or shown as part of the conspiracy charged. Hence, the *only* testimony was to the effect that the notes were to be "passed" as true and genuine. Therefore, the "relationship" the Court visualized in his Memorandum never appeared. If the facts most favorable to the Government are considered, the Trial Court set upon petitioner a vicarious criminal responsibility since the Agent who testified in support of Counts V and VI (Tr. 320-329) (Tr. 406-407) made out a case of alleged "attempt to sell" that in no way, by allegation or proof, related petitioner to the count.[1] The Court dismissed Count IV for lack of proof (Tr. 458); and later charged the jury that there was no "sale" and confined Count V to an attempted sale of a single Federal Reserve

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[1] The doubtful character of this conviction is succinctly discussed in co-defendant Strollo's Petition for Certiorari and petitioner herein relies thereon.

Note numbered C 68185774 A (Govt. Ex. 27, Tr. 1113).[1] Giving the Government's case the most favorable interpretation, Zappia and Agent Vecchione were working at a proposed sale of counterfeit; Strollo assisted Zappia; petitioner cannot be said to have been an aider and abettor of an aider. The element necessary must be inferred; proof is lacking; hence, the inference is far too remote to be considered. Further light on the remoteness of the issue shows when we consider that the indictment sets the time within which the elements of the alleged crime of conspiracy took place: "from November 1, 1962, to February 11, 1963." (App. 27.) The overt acts done in furtherance of the alleged conspiracy were set forth in the first count of the indictment. They fell far short of that required in *United States v. Welsh*, 15 F. R. D. 189 (1953) relied on by the Trial Court. The test of *Cataeno v. United States*, 167 Fed. 820, C. A. 4 (1948), gives some balance where the word "transaction" frequently is said to involve the balancing of conflicting interests: (1) speed, efficiency and convenience in the function of federal judicial machinery, against (2) the right of an accused to a fair trial without *any* substantial prejudice to that right occasioned by the joinder of offenses and/or defendants. At best, the counts could not even be considered as vaguely interrelated. *Cf. United States v. Lembo*, 184 Fed. 2d 411 (1950).

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[1] See pp. 12, 13; *Strollo v. United States*, Petition for Certiorari.

CONCLUSION.

For the reasons set forth, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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INDICTMENT.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

CRIMINAL NO. 63-50.

UNITED STATES OF AMERICA,

VS.

LENINE STROLLO, VINCENT SERMAN, ROBERT H. ARMSTRONG, JOHN PAUL PALADINICH, AND NICK ZAPPIA.

Violation: Title 18, Section 371, 472 and 473, U. S. C.

* * * * *

The Grand Jury Charges:

From on or about November 1, 1962, to on or about February 11, 1963, in the Eastern Division of the Northern District of Ohio, Lenine Strollo, Vincent Serman, Robert H. Armstrong, and John Paul Paladinich knowingly, wilfully, unlawfully, with intent to defraud, did conspire together to defraud the United States of America and to violate Sections 472 and 473, Title 18, United States Code, by receiving, passing, selling, attempting to pass and attempting to sell obligations and securities of the United States made in the similitude of genuine $10.00 Federal Reserve notes with the intent to defraud and with the intent that said counterfeit notes be passed and used as true and genuine when, in fact, said persons knew said notes to be counterfeit.

As part of said conspiracy it was planned and intended that Lenine Strollo and Vincent Serman would receive counterfeit $10.00 Federal Reserve notes and would attempt to sell, transfer, deliver, exchange, pass and find others to buy, pass and attempt to pass said counterfeit $10.00 Federal Reserve notes.

As a further part of said conspiracy it was planned and intended that Robert H. Armstrong and John Paul Paladinich would receive, possess, pass and attempt to pass said counterfeit $10.00 Federal Reserve notes.

As a further part of said conspiracy it was planned and intended that Robert H. Armstrong and John Paul Paladinich would return the proceeds from receiving, possessing, passing and attempting to pass said counterfeit $10.00 Federal Reserve notes to Lenine Strollo and Vincent Serman, including money and property obtained from said activities and that thereafter Lenine Strollo, Vincent Serman, Robert J. Armstrong and John Paul Paladinich would divide said proceeds.

In furtherance of said conspiracy the following overt acts were committed:

1. On or about January 2, 1963, Vincent Serman, John Paul Paladinich and Lenine Strollo met at Lenine Strollo's home at 391 Jackson Street, Campbell, Ohio, and counted six thousand counterfeit $10.00 Federal Reserve notes.

2. On January 4, 1963, John Paul Paladinich passed counterfeit $10.00 Federal Reserve notes at Boardman, Ohio, Youngstown, Ohio, and Warren, Ohio.

3. On or about January 4, 1963, John Paul Paladinich, Vincent Serman and Joseph Paladinich, not herein indicted, met at the New York Central Railroad Depot at Youngstown, Ohio, and divided the proceeds of the passing activities of John Paul Paladinich and Joseph Paladinich in Boardman, Ohio, and Youngstown, Ohio.

4. On or about January 4, 1963, John Paladinich, Lenine Strollo and Vincent Serman met at Liberty Township, Trumbull County, Ohio, and divided the proceeds from the passing activities of John Paul Paladinich at Warren, Ohio.

5. On or about January 31, 1963, Vincent Serman, John Paul Paladinich and Robert J. Armstrong met at Lenny's Lounge at Poland, Ohio, where plans were made for passing and attempting to pass counterfeit $10.00 Federal Reserve notes in Columbus, Ohio, and where Robert J. Armstrong received from Vincent Serman five hundred counterfeit $10.00 Federal Reserve notes for said passing activities.

6. On or about February 1, 1963, John Paul Paladinich and Robert J. Armstrong passed counterfeit $10.00 Federal Reserve notes at Columbus, Ohio.

All in violation of Title 18, Section 371, United States Code.

COUNT II.

And the Grand Jury further charges:

On or about January 2, 1963, in the Eastern Division of the Northern District of Ohio, Lenine Strollo, Vincent Serman and John Paul Paladinich did, with intent to defraud, have in their possession a counterfeit obligation of the United States of America purporting to be a $10.00 Federal Reserve note bearing Serial No. E 15285600 C, knowing said note to be counterfeit; in violation of Title 18, Section 472, United States Code.

COUNT III.

And the Grand Jury further charges:

On or about January 4, 1963, in the Eastern Division of the Northern District of Ohio, Vincent Serman, Lenine Strollo and John Paul Paladinich did, with intent to defraud, pass and attempt to pass a counterfeit $10.00 Federal Reserve note bearing Serial No. E 15285600 C at the Stambaugh-Thompson Store, Warren Shopping Plaza,

Elm Road, Trumbull County, Ohio, knowing said note to be counterfeit; in violation of Title 18, Section 472, United States Code.

COUNT IV.

And the Grand Jury further charges:

On or about January 31, 1963, in the Eastern Division of the Northern District of Ohio, at and about Poland, Ohio, Lenine Strollo, John Paul Paladinich and Robert H. Armstrong did, with intent to defraud, have in their possession five hundred counterfeit obligations of the United States purporting to be $10.00 Federal Reserve notes, Serial No. C67105007 E, knowing said notes to be counterfeit; in violation of Title 18, Section 472, United States Code.

COUNT V.

And the Grand Jury further charges:

On or about January 31, 1963, in the Eastern Division of the Northern District of Ohio, at Youngstown, Ohio, Lenine Strollo and Nick Zappia did, with intent to defraud, sell and attempt to sell counterfeit $10.00 Federal Reserve notes bearing Serial No. C 68185774 A to Special Agent Leonard A. Vecchione, of the United States Secret Service, knowing said notes to be counterfeit; in violation of Title 18, Section 472, United States Code.

COUNT VI.

And the Grand Jury further charges:

On or about February 1, 1963, in the Eastern Division of the Northern District of Ohio, at Youngstown, Ohio, Lenine Strollo and Nick Zappia did deliver to Special Agent Leonard A. Vecchione, of the United States Secret Serv-

ice, a counterfeit $10.00 Federal Reserve note bearing Serial No. C 68185774 A, with intent that the same be passed and used as true and genuine, knowing said note to be counterfeit; in violation of Title 18, Section 473, United States Code.

A true bill.

_____,

Foreman.

_____

United States Attorney.

MEMORANDUM OPINION ON MOTION FOR SEVERANCE AND FOR SEPARATE TRIALS.

Criminal No. 63-50.

* * * * *

KALBFLEISCH, *J.*

The indictment contains six counts. The first count charges that Lenine Strollo, Vincent Serman, Robert H. Armstrong, and John Paladinich conspired to receive, pass and sell counterfeit Federal Reserve notes. Count I further alleges that as part of this conspiracy it was planned that Lenine Strollo and Vincent Serman would find others to buy, pass and attempt to pass such counterfeit notes. Counts II, III and IV allege that various of the defendants named in the first count possessed and attempted to pass counterfeit notes. Counts V and VI charge that Lenine Strollo, who was named as a defendant in the conspiracy count, and Nick Zappia, who was not otherwise named in the indictment, attempted to pass and sell counterfeit notes. There is no allegation in Counts V and VI that these actions were taken in pursuance of the conspiracy charged in Count I.

Defendants Lenine Strollo and Vincent Serman have each moved for an order severing Counts V and VI from the remaining counts of the indictment and directing that Nick Zappia and Lenine Strollo, insofar as the latter is charged in Counts V and VI, be tried separately and apart from the trial of the other defendants. The basis for these motions is an alleged misjoinder of parties defendant and of offenses.

1. *Misjoinder of Offenses.*

The moving defendants have urged that there is a material difference between the charge of passing counterfeit notes and the charge of selling such notes. The Court holds that there is such a similarity between passing counterfeit notes and selling them that both activities, in appropriate cases such as this, can be classified as being of the same or similar character, or as "being based on the same action or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." Rule 8(a), Federal Rules of Criminal Procedure; *Cataneo v. United States,* 167 F. 2d 820 (4th Cir., 1948).

It is clear that the indictment is concerned with no other matters than a conspiracy to dispose of counterfeit notes and various overt acts which were taken to dispose of such notes. Thus, all of the acts charged in the indictment "are of the same or similar character" (Rule 8(a), Federal Rules of Criminal Precedure) and the offenses were properly joined in one indictment.

2. *Misjoinder of Defendants.*

The moving defendants further contend that there was a misjoinder of defendants in the indictment. Rule 8(b), Federal Rules of Criminal Procedure, provides that:

"Two or more defendants may be charged in the same indictment if they are alleged to have participated in

> the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

The moving defendants' claim of misjoinder is based on the contention that the indictment does not charge that Lenine Strollo and Nick Zappia, insofar as they are named in Counts V and VI, participated in the same transaction or series of transactions that are the subject of the remaining counts of the indictment. Furthermore, Nick Zappia is not named as a defendant in the conspiracy count, and therefore they contend that especially in regard to him there is no indication that the acts charged in Counts V and VI were connected with the acts charged in the other counts. In other words, they urge that there is nothing in the indictment to show that there is any connection between the first four counts and these last two counts. Therefore, the moving defendants contend that the joinder of Strollo and Zappia under Counts V and VI with the other defendants under Counts I through IV is a violation of Rule 8(b), Federal Rules of Criminal Procedure, and that they are, as a matter of right, entitled to the relief sought. See *Ingram v. United States*, 272 F. 2d 567 (4th Cir., 1959); *Ward v. United States*, 289 F. 2d 877 (1961, D. C. Cir.); and *United States v. Harvick and Beattie*, 153 F. Supp. 696 (N. D. 1957).

The Court does not agree with these contentions because of three allegations which are contained in the indictment: (1) Count I charges Lenine Strollo with being a party to the conspiracy; (2) Count I charges that as part of the conspiracy it was planned that Lenine Strollo would attempt to find others to pass and attempt to pass counterfeit notes; and (3) the acts charged in Counts V and VI

are alleged to have occurred on dates which are within the period of the conspiracy alleged in Count I.

A similar question was considered by the District Court for the District of Columbia in *United States v. Welsh*, 15 F. R. D. 189 (1953). In that case Judge Holtzoff held that when Count I of an indictment alleged a conspiracy in regard to operation of a numbers racket, and the remaining counts alleged various substantive acts in regard to the numbers racket, the fact that the date of each substantive act was alleged to have been within the time period of the conspiracy created a reasonable inference that the charges in the later counts were part of the same acts or transactions as was the conspiracy count. For this reason the Court there held that joinder of the defendants under Rule 8(b) was proper, and a motion for severance was denied.

This Court believes that the allegations that Strollo was a party to the conspiracy charged in Count I, that the conspiracy contemplated that Strollo would procure others to assist in passing the notes, and in Counts V and VI that Strollo and Zappia were passing and selling counterfeit notes, clearly assert actions which are part of the same series of acts or transactions. This is true in view of the fact that the passes and sales are charged to have occurred within the time period when the conspiracy was in existence. These allegations are therefore sufficient to charge the existence of one series of acts or transactions making joinder of the defendants permissible under Rule 8(b), Federal Rules of Criminal Procedure. For other cases where joinder has been held proper, see *Kleven v. United States*, 240 F. 2d 270 (8th Cir., 1957); *Kivette v. United States*, 230 F. 2d 749 (5th Cir., 1956); and *Wiley v. United States*, 277 F. 2d 820 (4th Cir., 1960).

If at the trial the evidence fails to substantiate the relationship, which the Court believes the indictment indicates, between the acts charged in Counts V and VI and the remaining counts, then the defendants will be entitled to appropriate relief at that time.

3. *Relief under Rule 14.*

The Court will consider these motions as requests that it exercise its discretion, purs ant to Rule 14, Federal Rules of Criminal Procedure, to sever the indictment and order separate trials of defendants Strollo and Zappia on Counts V and VI in the basis that the joinder of offenses and defendants in one trial would prejudice any defendant. However, the Court has not been presented with sufficient evidence to warrant such relief. This is especially true in view of the fact that all of the acts alleged appear to have been part of one counterfeiting plan which can best be presented as one entire picture to one jury. The Court, in the exercise of its discretion, will at this time deny such requests.

/s/ GIRARD E. KALBFLEISCH,
United States District Judge.

JUDGMENT.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

* * * * *

CR 63-50.

(Filed August 1, 1963.)

On this 31st day of July, 1963 came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon a verdict of guilty as to Counts I, II, and III of the Indictment of the offenses of having knowingly wilfully, unlawfully with intent to defraud, conspired with other persons to defraud the United States of America; having, with intent to defraud, had in his possession a counterfeit obligation of the United States of America, knowing said obligation to have been counterfeit; having, with intent to defraud, passed and attempted to pass a counterfeit Federal Reserve note, knowing said note to be counterfeit as charged in Counts I, II, and III of the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Three (3) years on Count I of the Indictment, five (5) years on each of Counts II and III of the Indictment, said sentences to be served consecutively, total sentence: thirteen (13) years.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

GIRARD E. KALBFLEISCH,
United States District Judge.

ORDER.

No. Cr. 63-50.

* * * * *

KALBFLEISCH, *J.*:

Upon consideration,

IT IS ORDERED that the motions of Defendants Lenine Strollo and Vincent Serman for severance and for separate trials are hereby denied.

/s/ GIRARD E. KALBFLEISCH,
United States District Judge.

COURT'S EXHIBIT C.

STATEMENT.

CITY OF CLEVELAND,
COUNTY OF CUYAHOGA,
STATE OF OHIO, SS:

I, Joseph Edward Paladinich, being first duly sworn, according to law, depose and say:

I have been advised by Special Agent Herbert Dixon, that under the provision of the Constitution I cannot be compelled to be a witness against myself; and knowing that anything I say may be used against me, I wish to make the following statement of my own free will and accord, without coercion or threats, and without promise of immunity.

This statement is a voluntary act on my part, prompted by my desire to tell the facts and I do not expect to gain any reward or special consideration by reason of having made this statement.

I am 27 years of age and reside at 530 Clyde Avenue, Youngstown, Ohio.

The first mention of counterfeit money was made on an occasion sometime during the month of December 1962, at which time my brother, John Paladinich, and I, utilizing John's 1962 Ford stationwagon, had driven to the home of Vincent Serman, 3478 Bentwillow, Youngstown, Ohio, where we were to move office furniture from Serman's home to his law offices, located at 26 Boardman Street, Youngstown. We were moving several sections of cardboard files, which we had placed in the rear of the stationwagon; and, while en route from Serman's home to his offices, Serman, who was sitting in the front seat between myself and John (who was driving), carried on a conversation with John, during the course of which Serman said, "The paper (meaning counterfeit money) I have seen is nearly ready and will be ready to move."

I had no further occasion to discuss or overhear the topic of counterfeit money, until the late evening hours of 1-3-63, when I was at my home and received a telephone call from my brother, John, who said, "I've got something good and will be up to see you shortly." About 45 minutes thereafter, John came to my home and showed me $1,000 in counterfeit $10 bills, which had as part of their serial number the digits "600" and the letter "C." I also noticed that all the $10 bills contained the same serial number. John left a sample of this counterfeit $10 bill with me, which I intended to spend that night for gasoline.

During the conversation with my brother, I learned that John had received the counterfeit money from Vincent Serman; further, that we were not to pass any of said money in Cleveland, as this was the area in which the printer was to pass notes. John told me that, in the event I was arrested while passing counterfeit notes, I was to state that I had found the counterfeit money and at the first opportunity was to telephone my lawyer, Vincent

Serman. John and I made arrangements to start our pass-

I have read over the foregoing statement, consisting of 5 pages, and I have been given an opportunity to make corrections. All the facts contained herein are true and correct to the best of my knowledge.

(Signed) JOSEPH PALADINICH.

Sworn to before me this 21st day
of February 1963 ____,
s/ HERBERT C. DIXON
Special Agent, U. S. Secret Service
Witnessed: RONALD J. SZEGO
Exhibit B-2

ing activities in the early morning of 1-4-63. John further stated that there were two teams of passers, which were to start operations on 1-4-63—that John and I comprised one team, while two other fellows made up the second team. John and I were to pass counterfeit money, the proceeds of which were to be turned over to Vincent Serman. John claimed that Serman needed $15,000 in genuine money to pay off the printer and that, thereafter, Serman was to give John and me $5,000 in counterfeit money, apiece, for our efforts.

At approximately 8:00 a.m. on 1-4-63, I drove my 1949 Ford auto to an Isaly's dairy store, located in Cornersburg, and there met with my brother, John, who was driving his vehicle. We then proceeded to a Howard Johnson Restaurant, located at 6123 Market Street, Boardman, Ohio, where John gave me approximately $500's worth of counterfeit $10 notes. We had coffee and, upon departure, John passed a counterfeit $10 bill in payment of our check. Driving our individual cars, we then proceeded to a Morgan Boy Wonder Restaurant, at 7240 Market Street,

Boardman, where we had coffee, and John then passed a counterfeit $10 note in payment of the bill.

Upon departure, we proceeded in our separate vehicles to the Boardman Shopping Plaza, where I passed a counterfeit $10 bill at a Gray's Drug Store, where I bought a pack of cigarettes and a pack of Gillette Super Blue Blades.

My brother passed a counterfeit $10 note at an A & P Grocery Store at said plaza.

We then drove our cars to the downtown Youngstown area and parked in a local parking lot and separated for further passing activities. I passed a counterfeit $10 note at People's Drug Store, 204 W. Federal Street, where I purchased Angelique's Black Satin Perfumed Hair Spray for $1.50.

I think my brother passed a couple of counterfeit notes in the downtown area; however, I have no specific information.

At approximately 11:15 a.m., this date, John and I met at our cars, in the parking lot, at which time John placed a telephone call. He let the phone ring one or two times, hung up, waited about five minutes, and then dialed a second number and had some conversation. John told me that he had just talked to Serman and that this telephone routine was a pre-arranged affair, whereby it avoided the possibility of the police tracing any calls or conversation. John said that he had received instructions that he and I were to drive our cars to the front of the New York Central Railway Station, Wilson and Himrod Streets, Youngstown, there to await the arrival of Vincent Serman. John parked his vehicle on one side of the drive, and I parked directly opposite. I left my car and got into John's car, where we awaited the arrival of Serman, who appeared about 15 minutes later (approximately 11:45

a.m.), driving a cream-colored or white 1960 or 1961 Pontiac or Oldsmobile. Just prior to Serman's arrival, I gave John all the money I had realized from the passing of counterfeit notes (about $27). When Serman arrived, he stopped his car in the middle of the drive, directly between my brother's car and mine. John got out of his car and talked to Serman about two or three minutes. He then returned to his car, where he removed all the items he had purchased from passing counterfeit notes and placed same in the rear seat of the vehicle Serman was using.

Serman then told me to remove the stuff from my car and place it in the back seat of his vehicle. He then said to me, "Why aren't you passing more counterfeit money?" I replied, "I feel squeamish about doing this." He then said, "Try to take it easy and push more of this money. The more you pass, the easier it'll become." John then said to Serman that we didn't want to pass money in downtown Youngstown; that we were going to go to Warren, Ohio. Serman got into his car and proceeded down Wilson Avenue, towards Campbell, Ohio. My brother and I returned to our cars, and I followed him to the Liberty Bowling Lanes, Liberty Township, Ohio. I parked my car in the parking lot of the bowling alley and got in my brother's car and we proceeded to Warren, Ohio.

Upon arrival in the downtown section of Warren, John and I went into a Gray's Drug Store, 100 North Park Avenue, and had a sandwich and coffee. Upon departure, John paid the bill and may have passed a counterfeit note at that time.

We then separated, and I went to a Thrifty Drug Store at 148 W. Market Street, where I purchased two packs of Lucky Strike cigarettes and a pack of Gillette Super Blue Blades. I passed about two other counterfeit bills; however, I cannot recall the exact location, and I was later

told by John that he had also passed several counterfeit $10 notes in the same area.

We then proceeded, via John's automobile, to the Warren Shopping Plaza, also known as the Elm Road Plaza, Route 5, just outside the city limits of Warren, Ohio. I entered a Stambaugh-Thompson Hardware Store in this plaza and, while walking around, noticed that John was also present. After a couple of minutes, I noticed that John left the store, after making a small purchase; and, shortly thereafter, I attempted to leave and tendered a counterfeit $10 bill in payment of some small electrical items, which I was going to purchase. The store clerk became suspicious of the counterfeit note which I was attempting to pass and made a comparison with another $10 note which was in the cash register (the second bill was passed by John), and the clerk determined that she had two $10 bills with the same serial numbers and that they were thus counterfeit. She notified the store manager, who requested that I await the arrival of the police, who would make an investigation.

This same date, officers of the Warren Police Department took me into custody and notified the U. S. Secret Service.

On the following day, I was released on $1,500 bond, and Vincent Serman acted as my attorney. Serman told me that he had made several phone calls in an attempt to locate me on the day of my arrest, 1-4-63. It is my understanding that he had called Warren, Girard, Niles, Liberty Township and Trumbull County police in an effort to locate me.

Serman questioned me very closely as to exactly what I had told agents of the Secret Service and the Warren Police Department. Serman told me not to tell authorities

anything of my activities, as it would only lead to the arrest of my brother, John, and might endanger himself.

Between 1-5-63 and 1-31-63, I had several personal contacts with Serman, at which time we discussed the possibility of continuing the passing of counterfeit money. On one occasion, 1-25-63, I drove to my brother's home at 21 Jonathan Lane, Youngstown, where I met with my brother; and, driving our individual cars, we proceeded to the only Isaly's Dairy Store located in Cornersburg, Ohio, and there met with Vincent Serman. I asked him if we could go out on the road passing counterfeit money. He replied that he didn't want me to, for the simple reason that I had just gotten arrested and things were too hot. I then asked him if my brother could go out and pass counterfeit money for me. He replied that that sounded like a pretty good idea. He said, "I'm going to meet the man with the paper tonight, and then I'll let you know what I'm going to do."

Serman said that he would call the man right then, at which time he placed a telephone call from the public pay station, which was located in the Isaly's store. During the course of this meeting, my brother became suspicious of a customer and, when the customer departed the store, they told me to go outside and check the type of vehicle he was driving and to get the license number, if possible.

While at the store, the pay phone rang, and Serman immediately answered and carried on a conversation. Serman, John and I continued our discussion about passing counterfeit money, and Serman mentioned that there was a new variation, as yet unpublicized, and that this new variation would become available shortly. Serman said that before the next passing expedition was to occur, we would have another meeting, where definite instructions and details would be provided.

On 1-31-63, around 6:00 p.m., my brother telephoned me and told me to meet him at his home. At approximately 7:30 p.m., I arrived at John's home, and John said to wait around; that Serman was going to telephone. A few minutes thereafter, Serman telephoned, and about 8:45 p.m., Serman drove into the driveway of John's home; whereupon, John and I got into Serman's car, a 1963 Chevy convertible. I asked Vince Serman for some counterfeit money for my own use. He asked me where I was going to spend it. I told him I was going to Washington, D. C.; that I knew the town pretty well. He then replied that it would be okay with him if my brother didn't object. My brother replied, "We'll go ask Lenny Strollo if he'll give you some counterfeit money for yourself." Serman said, "I don't want you (meaning me) along, when we talk to Strollo, because he's still mad at you for not running from the hardware store at the time of your arrest in Warren." My brother said he was pretty sure Lenny would give the money to me, and we then went home.

I left in my car, and John and Serman drove off in Serman's car.

I had no further contact with Serman until either 2-12-63 or 2-13-63, when Serman drove to Benita Auto Body Shop, Elm Street and Benita, Youngstown, where he met with me, and we eventually got into his car. Serman asked me if I had said anything to the Secret Service agents about counterfeit money, and I replied that I had not. He wanted me to ask my brother to arrange a meeting, so that he could ask my brother to admit his part in this counterfeiting operation to Vince Serman's attorney. I was not in agreement with this. He then said if things go bad, to protect my brother I was to admit that I was with Bobby Armstrong during my passing activities.

On 2-20-63, I identified and marked for purposes of

identification four articles which I purchased with counterfeit money on 1-4-63, described as follows: One can of Angelique Black Satin Perfumed Hair Spray, costing $1.50; two packs of Lucky Strike cigarettes and one package of Gillette Super Blue Blades, costing a total of eighty-one cents.

I should like to add that on one occasion, while John, Serman and I were in an Isaly's Dairy Store in Cornersburg, Ohio, Serman said that if I were to talk Frank was the type of fellow to put a gun in my ear and pull the trigger without any personal feelings. I asked him why he had told me this, and he said not to worry about it; that it was just to let me know the score.

I have read over the foregoing statement, consisting of five pages, and I have been given an opportunity to make corrections. All the facts contained herein are true and correct, to the best of my knowledge.

s/ JOSEPH PALADINICH.

Sworn to before me this 21st day
of January 1963.

s/ Herbert Dixon
Special Agent, U. S. Secret Service.

Witnessed: Ronald J. Szego.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF OHIO, SS:

I, C. B. Watkins, Clerk of the United States District Court for the Northern District of Ohio, do hereby certify that the annexed and foregoing is a true and full copy of the original COURT'S EXHIBIT C filed Jul. 23, 1963 in Criminal Action No. Cr. 63-50.

now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Cleveland, Ohio this 18th day of November, A. D. 1964.

C. B. WATKINS,
Clerk.

By RICHARD R. PETERS,
Deputy Clerk.

JUDGMENT, UNITED STATES COURT OF APPEALS, SIXTH CIRCUIT.

(Filed November 2, 1964.)

Nos. 15,675; 15,676; 15,702.

Before EDWARDS, Circuit Judge, PRETTYMAN, Senior Circuit Judge, and BOYD, District Judge.

THIS CAUSE having come on to be heard upon the record, the briefs, and the arguments of counsel, and upon due consideration thereof, finding no error affecting substantial right of appellants,

IT IS ORDERED that the judgment of the District Court be, and it is, hereby affirmed.

Entered by order of the Court.

CARL W. REUSS,
Clerk.

ORDER DENYING PETITIONS TO REHEAR AND MOTIONS TO REMAND.

(Filed January 21, 1965.)

Nos. 15675 and 15676.

UNITED STATES COURT OF APPEALS.

Before EDWARDS, Circuit Judge, PRETTYMAN, Senior Circuit Judge (by designation), and BOYD, District Judge (by designation).

Upon due consideration by the Court of Appellants' pending petitions to rehear and motions to remand and stay mandate of this Court and the response thereto by the Appellee herein;

IT IS ORDERED that said petitions to rehear and motions to remand and stay be and the same are hereby in all things denied.

By order of the Court.

/s/ CARL W. REUSS,
Clerk.

(4182-2)

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 997

LENINE STROLLO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1011

VINCENT SERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The court of appeals affirmed without opinion (Pet. No. 997 App. 28; Pet. No. 1011 App. 46; R. 6-

7).[1] The opinion of the district court denying petitioners' motion for a severance (Pet. No. 997 App. 21-24; Pet. No. 1011 App. 31-35; R. 2 (12a-17a)) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1964. Petitions for rehearing were denied on January 21, 1965. By orders of Mr. Justice Stewart, the time for filing the petitions for writs of certiorari was extended to and including March 22, 1965. The petition for a writ of certiorari in No. 997 was filed on March 17, 1965. The petition for a writ of certiorari in No. 1011 was filed on March 20, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in refusing to order a severance of one count, which charged an attempt to sell counterfeit currency by one of the petitioners and by another person who was not named in the conspiracy or other substantive counts.

2. Whether the evidence of petitioner Strollo's guilt was sufficient to support his conviction under Count V.

3. Whether the district court properly instructed the jury on the evidence necessary to prove an attempt.

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[1] "R." refers to the record of the proceedings in the court of appeals. "Tr." refers to the transcript of the trial proceedings.

4. Whether the district court committed plain error in its response to the jury's request for particular information.

5. Whether consecutive sentences could properly be imposed on the conspiracy and substantive counts.

RULE INVOLVED

Rule 8, F. R. Crim. P. provides:

> (a) *Joinder of Offenses.* Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> (b) *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

STATEMENT

Petitioners were convicted by a jury in the United States District Court for the Northern District of Ohio under an indictment charging that between November 1, 1962, and February 11, 1963, petitioners, together with Robert Armstrong and John Paladinich,

conspired to pass and sell counterfeit currency in violation of 18 U.S.C. 371 (Count I); that on January 2, 1963, petitioners and Paladinich, with intent to defraud, possessed a counterfeit $10 Federal Reserve note, in violation of 18 U.S.C. 472 (Count II); that on January 4, 1963, petitioners and Paladinich, with intent to defraud, passed a counterfeit $10 Federal Reserve note, in violation of 18 U.S.C. 472 (Count III); and that on January 31, 1963, petitioner Strollo and co-defendant Nick Zappia, with intent to defraud, attempted to sell counterfeit $10 Federal Reserve notes, in violation of 18 U.S.C. 472 (Count V).[2] Petitioner Strollo was sentenced to imprisonment for three years on each of the first three counts, and to five years' probation on Count V, the sentences to run consecutively (Pet. No. 997 App. 26-27). Petitioner Serman was sentenced to consecutive terms of imprisonment for three years on Count I, five years on Count II, and five years on Count III (Pet. No. 1011 App. 36). The court of appeals affirmed.

1. The government's evidence showed that in the fall of 1962 petitioner Serman, an Ohio attorney, spoke with John Paladinich about passing counterfeit money Serman expected to receive (Tr. 2-6). On January 3, 1963, Serman had Paladinich meet him at the home of petitioner Strollo, a mutual acquaintance (Tr. 7-9). There Serman, Strollo, and Paladinich

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[2] Armstrong pleaded guilty to Count I (Tr. 1068). Paladinich pleaded guilty to the first three counts (Tr. 1068). Co-defendant Zappia was convicted on Count V (Tr. 1134). Counts IV and VI were dismissed (Tr. 458, 1109).

counted through several packages of counterfeit $10 Federal Reserve notes, discussed how to make the notes look old, and talked about the method to be used in passing them (Tr. 9-11). Strollo then showed Paladinich a desk drawer containing additional stacks of bills, purportedly a total of $60,000: of that sum $20,000 was in each of three different serial numbers (Tr. 11-12). It was agreed that Paladinich would enlist the aid of his brother, Joseph, in passing the notes, and that the first $7,500 obtained in genuine currency would be given to Serman to pay off the printer (Tr. 12-13, 98). Serman then handed Paladinich $1,000 in counterfeit currency to begin distribution (Tr. 13).

The morning of the next day, January 4, 1963, Paladinich and his brother began passing the notes by making small purchases at retail stores in nearby towns (Tr. 16-19, 155-157). About 11:30 a.m. Serman met them at the railway station in Youngstown (Tr. 20-21, 158-159). Paladinich gave Serman their proceeds, about $80 in genuine currency, together with the items they had purchased (Tr. 22, 160).[3] Thereafter the brothers drove to Warren, Ohio, where each continued to pass counterfeit notes until Joseph was apprehended in a department store (Tr. 23-24, 161-163, 273-274). When Joseph failed to appear at their designated meeting place, Paladinich telephoned Serman that he feared his brother had been caught

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[3] The items were later found by Treasury agents in the basement of Strollo's home (Tr. 61-63, 65-69, 71-73, 171-172, 246, 251-257).

(Tr. 25-30, 299-302). Within twenty minutes both petitioners met Paladinich at the place from which he had called (Tr. 30). Paladinich turned over to Strollo approximately $100 in genuine currency which he had obtained in the Warren area (Tr. 31, 122-123). Shortly thereafter, upon seeing police officers examining Joseph's parked automobile, the three left the vicinity (Tr. 31-32).

The following morning, on January 5, Serman arrived at the Warren city jail to arrange bail for Joseph (Tr. 34, 163, 200-201). In a private conversation he told Joseph to tell the law enforcement officers nothing which might jeopardize the others involved (Tr. 164, 199). Later on January 5, when interviewed by Treasury Department agents, Joseph voluntarily disclosed what he knew concerning the counterfeiting activities and agreed to keep Agent Dixon informed of future developments (Tr. 181, 211).[4] That afternoon, after his release on bond, Joseph met Serman at the latter's office and told him that he had disclosed nothing to the agents (Tr. 165, 197-198, 201-202).

On January 25, 1963, Paladinich and Joseph arranged a meeting with Serman at a store, and inquired about resuming the passing of counterfeit notes (Tr. 37, 215-216). Serman stated it would be too risky to have Joseph pass again, but indicated that Paladinich might (Tr. 166). Serman then placed a call from a nearby wall telephone (Tr. 37, 166-167), said to the

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[4] Between January 4 and February 12, Joseph met or telephoned Agent Dixon 30 to 35 times (Tr. 204, 211, 305-306, 311).

party on the line, "We can handle all you want" (Tr. 216), and then told the brothers that counterfeit money "was again ready to move" (Tr. 167) and that he would communicate with them (Tr. 38). A Treasury agent observed the meeting and overheard part of the conversation (Tr. 214-217).

On January 31, 1963, at about 9:30 p.m., Serman, Strollo, Paladinich, and one Robert Armstrong met in a restaurant and discussed passing a new series of counterfeit notes in Columbus, Ohio (Tr. 40-43, 410-411). They left with the understanding they would meet later at Strollo's bar (Tr. 43-44). Serman, Paladinich, and Armstrong arrived at the bar, waited for Strollo for over two hours, left, and returned some time before 2:00 a.m. to find that Strollo had arrived in the interim (Tr. 44-45, 47-50). Petitioners directed the others to leave for Columbus (Tr. 49). The following morning, in Columbus, Paladinich and Armstrong passed several $10 notes of the new series (Tr. 50, 53-54). At one store Armstrong feared he had been discovered, ran from the store, abandoned some of the remaining counterfeit notes in a nearby washroom, and returned with Paladinich to Youngstown (Tr. 55-58, 74, 239-240). Strollo and Serman there advised them to be quiet and say nothing as Treasury agents had been following them (Tr. 59-60). The notes abandoned by Armstrong were later recovered by federal agents (Tr. 243-244).

The evidence relating to Count V showed that on the afternoon of January 31, 1963, at Strollo's bar, an informant introduced Strollo to an undercover Treasury agent, Leonard Vecchione, who was posing

as an agent for a New York City loan shark (Tr. 320-321, 323, 333). During their conversation Strollo told Vecchione that it was hard to make a living in Youngstown (Tr. 322), and that he was "afraid to make a move because the town was loaded with Feds" (Tr. 344). About 30 to 45 minutes later, Nick Zappia entered the bar, talked to Strollo, and then was introduced to Vecchione by the informant (Tr. 322, 341, 345, 409-410). After talking to Vecchione and learning of his purported livelihood, Zappia asked if he would be interested in obtaining some counterfeit currency (Tr. 323). Vecchione replied that he might, depending on the quality and price (Tr. 323). The price, Zappia said, would be $17 per $100 of face value (Tr. 396). Zappia directed Vecchione to a booth in the back of the bar where they were joined by Strollo (Tr. 323, 410). Strollo produced a counterfeit $10 Federal Reserve note from his pocket (Tr. 324-325), handed it to Vecchione, and asked how much he could use (Tr. 323, 356). The serial number was C 68185774A (Tr. 388). After looking at the note and recognizing it as counterfeit (Tr. 325), Vecchione replied that he would be willing to purchase $300 worth with his own money, but that to buy more he would have to get in touch with his man in New York (Tr. 323-324). Strollo commented that he could not obtain so small an amount as $300 would purchase (Tr. 401). He said he had access to $20,000 in counterfeit notes but would have to check to see how much was then available (Tr. 324, 401). It was agreed that, while checking, he would try to obtain three or four sample notes in order that the uniformi-

ty of their quality might be ascertained by Vecchione (Tr. 324). They arranged to meet at 8:00 p.m. at Vecchione's hotel room (Tr. 324). Although Strollo declined any prepayment, Zappia subsequently accepted a $50 "advance" from Vecchione, to be deducted from the payment "when the deal was consummated" (Tr. 326-327, 360).

At 8 p.m. Zappia arrived at the hotel room (Tr. 325). He informed Vecchione that Strollo's "connection" was out of town, but that the one sample note Strollo had would be given to Vecchione that night so he could take it with him to New York the next morning (Tr. 325-326, 366-367). Shortly before midnight, Strollo drove Zappia back to the hotel (Tr. 411). Zappia handed Vecchione the counterfeit note displayed at the bar, and agreed to telephone him in New York so that the transaction could be consummated (Tr. 326, 397). Zappia then left the building and drove away with Strollo (Tr. 411-413).

2. At trial, during the cross-examination of Joseph Paladinich, the defense elicited testimony that Joseph had given an oral statement to federal agents about 2 or 3 p.m. on January 5, 1963 (Tr. 181-182), and that sometime thereafter (variously stated as January 5 (Tr. 182) and as later in January (Tr. 183-185)) he had signed a typewritten statement setting forth his knowledge of the offenses in question (Tr. 182-184). The typewritten statement, dated February 21, 1963, was marked "Court's Exhibit C", and a copy was furnished to petitioners' counsel (Tr. 185; Pet. No. 1011 App. 37-45). There was no ex-

amination based on the statement. Subsequently, during its deliberations, the jury asked, *inter alia*, "to hear the Court records as to the day and time Joseph Paladinich gave his written statement to the Federal officers" (Tr. 1124).[5] The United States Attorney pointed out that the statement was signed on February 21, and said that an answer as to date would give the impression that no statement was made before that time. The court noted that this was not what the witness had said (Tr. 1128). Petitioners' counsel then entered an objection to any reading of portions of testimony (Tr. 1128-1130) for fear of "undue emphasis on relatively minor points" (Tr. 1129). The court called in the jury and stated: "The Court's recollection is that the date and time of Joseph Paladinich's statement to the Federal officers was January 5th, between 2:00 and 3:00 o'clock in the afternoon" (Tr. 1131). Petitioners' counsel then asked to approach the bench (Tr. 1131-1132). After a short conference the court stated: "Well if there is any question about it the Reporter has it marked. Will you read the testimony of Joseph Paladinich as to when he gave the statement to the Federal officers?" (Tr. 1132). The pertinent testimony was then read to the jury by the court reporter (Tr. 1132).

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[5] They also asked for the "Court records" of the testimony of the Paladinich brothers concerning a meeting with Serman at the railroad station (*i.e.*, before their departure for Warren on January 4).

ARGUMENT

1. There is no merit to petitioners' contentions that the trial court erred in refusing to order a severance and separate trial on Count V (Pet. No. 997 App. 21-25; Tr. 441-442), which charged Zappia and petitioner Strollo with attempting to sell counterfeit $10 notes to Vecchione. All the offenses charged in the indictment involved the disposition of counterfeit currency for profit, and they were, therefore, of sufficiently "similar character" to justify their joinder under Rule 8(a), F.R.Crim.P. Nor can petitioner Serman object to his joinder, under Rule 8(b), with Zappia. The offense charged in Count V was one of the "series of acts or transactions" charged to the named defendants in all the counts of the indictment. Serman was, as the evidence demonstrated (pp. 4-7, *supra*), one of the two central figures in the conspiracy charged in Count I. In the course of that conspiracy and during the time when it was being executed, Strollo and Zappia committed the substantive offense charged in Count V.[6] The jury could find that that offense was, like the offenses in Counts II and III, one of a series committed in furtherance of the unlawful enterprise.

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[6] The close relationship in time, as well as in nature, of the Count V transactions to those of Count I, is demonstrated by the events of January 31. Between 3 and 8 p.m. Strollo was involved with the sale of notes to Vecchione (Tr. 321-325, 366, 409-410); at 9:30 he helped to plan the passing of notes in Columbus (Tr. 40-43, 410-411); at midnight he took Zappia to confer again with Vecchione (Tr. 411-413); and shortly thereafter he sent Paladinich and Armstrong to Columbus to begin passing (Tr. 49-50).

Indeed, even if the evidence had not been sufficient to permit the jury to conclude that the offense committed in Count V was committed in furtherance of the conspiracy, the district court would not have been required to grant a severance unless prejudice were shown. *Schaffer* v. *United States*, 362 U.S. 511. Here there was no such demonstration. The evidence on each count was clear and easily distinguishable, and the trial court carefully instructed the jury to consider the evidence against each defendant on each offense separately (Tr. 418, 1096-1097). Under the circumstances, the court did not abuse its discretion in denying a severance.

2. The evidence was plainly sufficient to sustain petitioner Strollo's conviction for attempting to sell counterfeit $10 notes to Vecchione.[7] Zappia asked Vecchione if he would be interested in buying counterfeit currency at a price of $17 per $100 of face value (Tr. 323, 396). When Vecchione indicated that he

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[7] After first instructing the jury on Count V as it appeared in the indictment (Tr. 1089-1090), the trial court, at the request of Zappia (Tr. 1112) and Strollo (Tr. 1114), later instructed that the evidence disclosed no consummated sale and that the only question for the jury was whether an attempt had been made (Tr. 1113-1114). Petitioner Strollo's statement that the court limited the issue to an attempted sale of a single note (Pet. No. 997, 7, 13) is erroneous. Although the court once made a reference to a "note" (Tr. 1113) instead of "notes", it is clear that no limitation was intended. Indeed the court indicated to the jury that the reason a consummated sale could not be found was that "[t]here was no delivery" (Tr. 1114). As there was a delivery of the sample note, it is apparent that the court was not considering the single, sample note as the subject of the count.

might be, Strollo gave him a counterfeit $10 note, asked how many he wanted, and stated that he had access to $60,000 (Tr. 323-325, 356). Upon discovering later that his supplier was out of town, Strollo had Zappia deliver the sample to Vecchione and make arrangements for a future consummation (Tr. 325-326, 366-367, 397, 411, 413). This was enough to support the jury's finding of an intent to sell and the requisite acts pursuant to that intent. Contrary to petitioner Strollo's suggestion (Pet. No. 997, 12), it is immaterial that Vecchione was not the object of the intent to defraud; it was sufficient if there was an intent to defraud an unknown future transferee or the United States itself. *Riggs* v. *United States*, 280 F.2d 750, 752 (C.A. 5).

3. In instructing the jury that "Whenever the design of a person to commit a crime is clearly shown, slight acts done in the furtherance of that design would constitute an attempt" (Tr. 1092-1093), the district court properly stated the applicable law. See *People* v. *Raffington*, 98 Cal. App. 2d 455, 460, 220 P. 2d 967, certiorari denied, 340 U.S. 912; *State* v. *Roby*, 194 Iowa 1032, 1043, 188 N.W. 709. Moreover, this was but one of several appropriate instructions given by the court in defining the term "attempt" (Tr. 1091-1093). Petitioners entered no objection to any of the definitions given (Tr. 1111).

4. There is no substance to petitioners' contention that the district court committed reversible error in its response to the jury's request "to hear the Court records" as to the date and time of Joseph's written

statement (Tr. 1124). The court intended to respond to the request by having the appropriate portions of the transcript read to the jury (Tr. 1124, 1127-1128, 1130). It was only in deference to petitioners' objection to a reading of the record (Tr. 1128-1130) that the court adopted the alternative procedure of relating its recollection of the testimony (Tr. 1131). After a bench conference, when some question was presumably raised, the court directed that the reporter read to the jury the pertinent portion of the transcript as had originally been requested (Tr. 1132). This, it would appear, resolved any ambiguity as to what dates and times were related in Joseph's testimony.[8]

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[8] Petitioners apparently take the position that a proper response to the jury's request should have include the fact that the typewritten statement produced at trial was actually dated February 21. The jury, however, asked, not for the date of the statement, but "to hear the Court records as to the day and time" of the statement. Petitioners' trial counsel, who had been furnished a copy of the statement (Tr. 185) and knew of that date which had been discussed (Tr. 1128), did not ask that the date be stated. In fact the matter was first raised on a petition for rehearing in the court of appeals (R. 9). Under the circumstances of the case there could have been no prejudice. The record does not show whether the written statement went to the jury with the other exhibits. If it did there was no prejudice, for the statement showed on its face that it covered events as late as February. If the statement was not before the jury, the time it was signed could not be significant since the jury would not know the contents thereof. There had been no examination bringing out the contents of the statements, and no suggestion that Joseph's first oral statement on January 5 differed from the written statement on February 21.

5. The district court did not err in imposing consecutive sentences on the first three counts. Although the substantive offenses were alleged as overt acts of the conspiracy, the indictment charged and the evidence showed a conspiracy of much greater compass than the substantive offenses. There was thus, in this case, a factual as well as legal basis for the application of the well settled rule that conspiracy is a separate offense from the overt acts committed in furtherance of the conspiracy. *Pinkerton* v. *United States*, 328 U.S. 640; *Bocock* v. *United States*, 216 F. 2d 465 (C.A. 7).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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